92-436

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1992

VINCENT JAMES LANDANO,

Petitioner,

v.

JOHN J. RAFFERTY, SUPERINTENDENT, RAHWAY STATE PRISON, et al.,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether probable innocence of a habeas petitioner is a factor that ought to be considered in determining whether extraordinary circumstances exist justifying a federal grant of bail pending exhaustion of state remedies?

PARTIES TO THE PROCEEDING

Petitioner, the habeas petitioner below, is Vincent James Landano. Respondents, referred to collectively as the "State" herein, are John J. Rafferty, Superintendent of Rahway State Prison, Irwin I. Kimmelman, Former Attorney General of New Jersey, Peter Perretti, former Attorney General of New Jersey, Leslie Faye Schwartz, a Deputy Attorney General, the Office of the Hudson County Prosecutor, the Kearny, Newark, Jersey City and Perth Amboy Police Departments, and Robert Del Tufo, the current New Jersey Attorney General.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Vincent James Landano, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals appears at App., 1 to 35. The two opinions of the district court appear at App., 36 to 44 and 45 to 66. The district court's opinion of February 4, 1992, is reported at *Landano v. Rafferty*, 782 F.Supp. 986 (D.N.J. 1992).

JURISDICTION

The judgment of the Court of Appeals was entered on July 16, 1992. As petition for rehearing was denied on August 11, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

This matter involves a district court's common law power to grant bail and does not involve any matters of statutory construction.

STATEMENT

1. This is a habeas corpus matter that arises from a grant of bail to the petitioner, Vincent James Landano, by a United States District Court pending exhaustion of state remedies.

2. The Third Circuit reversed and vacated that grant of bail concluding that while federal bail may be granted in extraordinary circumstances, here no such circumstances pertain.

3. Most important, the Circuit Court ruled that two factors relied upon centrally by the district court in granting bail, Mr. Landano's probable innocence and the complete absence of any state bail remedy during collateral state proceedings regardless of innocence, are irrelevant as a matter of law in determining whether or not extraordinary circumstances exist.

4. Circuit Judge Scirica, dissenting, would have affirmed, noting that this Court, in various decisions, has concluded that where there is a showing of probable innocence, procedural barriers to federal habeas corpus erected by this Court in the interests of federalism and comity should be relaxed to avoid manifest injustice. (App., 30 to 35)

5. The procedural history of this case is lengthy and complex. It is accurately detailed in the opinion below at App., 5 to 18. The history essential to this Petition is as follows: Following conviction by a New Jersey State jury in May of 1977 for the murder of a Newark, New Jersey police officer, John Snow, during the course of an armed robbery, the petitioner was sentenced to a term of life imprisonment and a consecutive seven to fifteen year

term for related offenses. Petitioner's direct appeals were unsuccessful and two state collateral attacks upon the conviction, in 1978 and 1982, were unsuccessful. Thereafter, in October of 1985, petitioner filed a federal petition for habeas corpus in the United States District Court for the District of New Jersey.

In 1987, the district court reluctantly denied a writ of habeas corpus, citing its obligation to defer to adverse state court factual findings and expressing the court's fear that an injustice might have resulted from denial of the writ. *Landano v. Rafferty*, 670 F.Supp. 570 (D.N.J. 1987), *aff'd*. 856 F.2d 569 (3d Cir. 1988), *cert. denied* 489 U.S. 1014.

Thereafter, the petitioner discovered and presented to the district court new evidence, previously suppressed by the State, demonstrating that a co-defendant, Victor Forni, murdered Officer Snow. The district court granted a writ of habeas corpus and released Mr. Landano on bail. The Third Circuit, however, reversed, on grounds of non-exhaustion and ordered the bail order vacated. *Landano v. Rafferty*, 126 F.R.D. 627 (D.N.J. 1989), *rev'd*, 897 F.2d 661 (3d Cir.), *cert. denied* 111 S.Ct. 46 (1990).

Landano then filed a petition for post-conviction relief in the New Jersey Superior Court, Law Division, Hudson County. The trial judge, the Honorable Maurice A. Walsh, Jr., denied his bail, but, after a series of emergent applications, Mr. Landano obtained from the Supreme Court of New Jersey a stay of the arrest order pending proceedings before the trial level judge. New Jersey has no provision for bail pending collateral attacks upon criminal convictions.

On March 4, 1991, without holding an evidentiary hearing, Judge Walsh denied petitioner's application, ruling that all issues in his state petition had previously been presented to and adjudicated by the state courts in prior proceedings. The judge recommended to the Supreme Court of New Jersey that the stay of the arrest order be immediately dissolved.

Deeming the trial court's ruling to be tantamount to a finding that he had exhausted state remedies, on March 11, 1991, Mr. Landano returned to federal court by filing a petition for habeas corpus. Meanwhile, the State moved before the Supreme Court of New Jersey for dissolution of the stay of the arrest order.

In order to prevent the exercise of federal jurisdiction over the new habeas corpus petition, the State filed a motion before the state trial court asking that court to "clarify" its opinion by declaring that Mr. Landano had not in fact exhausted state remedies. The federal district court stayed any action on the new petition pending the state court's response to the State's motion.

On April 9, 1991, the state court issued a "clarified" opinion now purporting, without any hearing, to reach the merits of Mr. Landano's state petition and ruling against him on those merits.

On May 1, 1991, the state supreme court dissolved its stay of the arrest order.

On May 3, 1991, the federal district court granted bail to Mr. Landano until it could rule on a motion by the State to dismiss the underlying habeas petition for want

of jurisdiction. The district court later explained its reasons for granting bail in a Supplemental Opinion and Order of May 6, 1991. (See App., 36 to 44). The State appealed that bail order.

On February 4, 1992, the district court denied the State's motion to vacate bail and to dismiss the petition for want of jurisdiction. The Court granted bail to Mr. Landano pending exhaustion of state remedies. (See Opinion and Order at App., 45 to 66).

The State sought to obtain review of both the district court's jurisdictional ruling and its grant of bail by filing a petition for certification pursuant to 28 U.S.C. § 1292(b).

The circuit court treated the State's petition as a notice of appeal and consolidated that appeal with the State's appeal from the prior grant of bail.

On March 12, 1992, the New Jersey Appellate Division reversed the trial judge's denial of post-conviction relief and remanded for an evidentiary hearing.

On July 16, 1992, the Third Circuit issued its opinion and order revoking Mr. Landano's bail.

On July 17, 1992, following a hearing, the trial judge denied all relief.

A Petition for Rehearing was denied on August 11, 1992.

The Court granted a stay of the mandate on August 26, 1992 providing this Petition is filed on or before September 8, 1992.

ARGUMENT

CERTIORARI SHOULD BE GRANTED TO RESOLVE A CONFLICT BETWEEN THIS COURT'S RULINGS WITH REGARD TO PROBABLE INNOCENCE AND THE THIRD CIRCUIT'S RULING IN THIS CASE THAT PROBABLE INNOCENCE IS IRRELEVANT AS A MATTER OF LAW TO THE AVAILABILITY OF BAIL PENDING EXHAUSTION OF STATE REMEDIES.

It has long been established, as a matter of common law, that a United States district court has the power to grant bail *prior* to adjudication of the merits of a writ of habeas corpus. *See, e.g., Barth v. Clise,* 12 Wall 400, 402 (1871). *See, also, Aronson v. May,* 85 S.Ct. 3, 5 (1964) (chambers opinion); *Lucas v. Hadden,* 790 F.2d 365 (3d Cir. 1986); *United States v. Smith,* 835 F.2d 1048, 1050 (3d Cir. 1987); *Calley v. Calloway,* 496 F.2d 701, 702 (5th Cir. 1974); *Martin v. Solem,* 801 F.2d 324, 329 (8th Cir. 1986).

In *Lucas v. Hadden,* 790 F.2d 365 (3d Cir. 1986), the Third Circuit recognized that a district court has the power to grant bail pending a petitioner's exhaustion of state remedies, provided exceptional circumstances are present. The Circuit deemed a liklihood of success on the merits of the habeas petition *not* to amount to exceptional circumstances justifying bail. *Id.* at 367.

Here, Mr. Landano has gone beyond merely showing a liklihood of success on the merits, but rather has convinced

the district court of his probable innocence.[1] The Third Circuit, however, has deemed it an abuse of the district court's discretion for it to conclude that probable innocence is a factor to be weighed in determining whether or not to grant pre-judgment bail to a habeas petitioner. In so ruling, the Circuit has abandoned an entire body of this Court's law that has created exceptions to various procedural barriers to habeas relief where a petitioner can make a substantial showing of innocence.

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[1] As Judge Scirica writes, dissenting:

> Here, the district court based its finding of extraordinary circumstances in part on a finding of probable innocence.[1] Because I believe a finding of probable innocence should override usual considerations of comity even when there is a lack of exhaustion, I respectfully dissent.
>
> [1] On July 27, 1989, the district court found that there was a "distinct possibility that [Landano], indeed, may be innocent of the charges for which he was convicted," and that there was "a substantial probability . . . that the jury's verdict would have differed had [the suppressed evidence] been brought out at trial." *Landano v. Rafferty*, 126 F.R.D. 627, 649, 654 (D.N.J. 1989), *rev'd on other grounds*, 897 F.2d 661 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 46 (1990). On May 6, 1991, and February 4, 1992, the district court found that Landano "may be innocent of the charges for which he was convicted." *Landano v. Rafferty*, Nos. 85-4777, 89-2454, slip op. at 7 (D.N.J. May 6, 1991); *Landano v. Rafferty*, 782 F.Supp. 986, 993 (D.N.J. 1992). The district court is not alone in this view. A judge of this court has stated that "the State's case [against Landano], erected upon a house of cards, has little, if any, credible foundation to it." *Landano*, 897 F.2d at 685 (Rosenn, J. dissenting). The Landano majority stated that it "join[ed] with the district

(Continued on following page)

Indeed, very recently, this Court has expressed considerable interest in the role that probable innocence plays in habeas corpus jurisprudence. On February 19, 1992, this Court grant certiorari to consider whether at violates the Eighth and Fourteenth Amendments to execute an innocent person and further to consider the procedures that ought to be provided in state and federal court to determine innocence in death penalty cases. *See, Herrera v. Collins*, ___ U.S. ___, 112 S.Ct. 1074 (1992).

On June 22, 1992, this Court held in *Sawyer v. Whitley*, ___ U.S. ___, 112 S.Ct. 2514 (1992), that execution of a habeas petitioner is impermissible if he or she can, by clear and convincing evidence, demonstrate actual innocence of either the underlying offense or the degree of aggravating required for the death penalty.

In so ruling, this Court analogized a trio of 1986 decisions, *Kuhlman v. Wilson*, 477 U.S. 436 (1986), *Murray v. Carrier*, 477 U.S. 478 (1986) and *Smith v. Murray*, 47 U.S. 527 (1986) that allowed relaxation of various procedural barriers to federal habeas relief where the petitioner can "show a fair probability that, in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after trial, the trier of facts

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(Continued from previous page)

court in finding Landano's new allegations deeply troubling." *Id.* at 675 n.23, but held that Landano had failed to exhaust his state remedies.

would have entertained a reasonable doubt of his guilt." *Kuhlman, supra*, 477 U.S. at 455 n.17. *See also, McCleskey v. Zant*, 111 S. Ct. 1454, 1470 (1991).

Here, the Third Circuit has erroneously excised this Court's well-developed probable innocence exception from the body of law governing the issuance of federal bail prior to adjudication of a federal writ of habeas corpus. Distinguishing this Court's rulings in that regard, the Circuit reasoned as follows:

> The district court's reliance on Landano's possible innocence raises different considerations. In *McClesky v. Zant*, 111 S. Ct. 1454, 1470 (1991), the Court reiterated that a federal court may grant a writ of habeas corpus to a petitioner to avoid a "fundamental miscarriage of justice" when "a constitutional violation probably has caused the conviction of one innocent of the crime." *See also Murray v. Carrier*, 477 U.S. 478, 496 (1986) (courts in "extraordinary case" may excuse the petitioner from showing cause for procedural default "where a constitutional violation has probably resulted in the conviction of one who is actually innocent"); *Smith v. Murray*, 477 U.S. 527, 537 (1986) (discussing doctrine in context of procedural default at sentencing phase); *Sawyer v. Whitley*, 60 U.S.L.W. 4655 (U.S. June 22, 1992) (same).
>
> We find two problems with the district court's reliance on Landano's probable innocence as a basis for bail. First, the "probable innocence" cases arise in the context of granting the writ, not granting bail. Second, and more important, that line of cases addresses the federal court's right to overlook a procedural default, not a failure to exhaust state remedies. When the State

> has not completed its review of the petitioner's claims, it is inappropriate for a federal court to reach the merits of petitioner's case in ruling on a motion for bail.
>
> The Supreme Court has emphasized that even in cases where a clear violation of the petitioner's rights was found, "considerations of federal-state comity would still inhere, and it would be unseemly in our dual system of government for the federal courts to upset a state-court conviction without affording the state courts the opportunity to correct a constitutional violation." *Duckworth v. Serrano*, 454 U.S. 1, 4 (1981) (per curiam). *See also Caswell v. Ryan*, 953 F.2d 853, 857 (3d Cir. 1992) (as a matter of comity, exhaustion "should be strictly adhered to because it expresses respect for our dual judicial system" (quoting *Landano*, 897 F.2d at 668), *cert. denied*, 60 U.S.L.W. 3798 (U.S. May 26, 1992). As we noted in *Lucas*, "We doubt that it is appropriate to grant bail prior to ruling on a state habeas petition solely on the ground that there is a high likelihood of success on the merits. . . . " 790 F.2d at 367.

(App., 27 to 28)

The circuit court's reliance on principles of comity and federalism as a basis for striking probable innocence as a factor to be considered is not consonant with this Court's ruling that even the holding of *Wainwright v. Sykes*, 433 U.S. 72 (1977), born of considerations of comity and federalism, can and should be relaxed to reach the merits of a federal habeas petition by one who is probably innocent. *See, Murray v. Carrier*, 477 U.S. 478 (1986).

And the circuit court's reference to the doctrine of exhaustion of state remedies is of no support to its position. Here, the petitioner exhaustively petitioned the state courts for bail prior to seeking federal bail. The State, opposing those efforts, argued successfully that New Jersey has absolutely no mechanism for providing bail pending collateral attacks regardless of any showing of innocence.[2]

CONCLUSION

Because New Jersey has no bail provision, if federal bail is not provided, Mr. Landano will be almost certainly reimprisoned. In order to avoid that unjust result and to resolve the conflict between this Court's decisions and that of the court below, this Court should grant certiorari and reach the merits of this petition. In the alternative, this Court should grant certiorari, retain the case on its docket, and remand this matter for reconsideration following and in light of this Court's future decision in *Herrera, supra*.

Respectfully submitted,

SMITH, MULLIN & KIERNAN, P.C.

Attorneys for Petitioner
Vincent James Landano

By: NEIL MULLIN, ESQ.

DATED: September 8, 1992

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[2] As Judge Scirica points out in his dissent, because New Jersey has no power to grant Mr. Landano bail, considerations of comity do not bar a federal grant of bail. Comity requires deference to a court of equal, concurrent power, not a court without the power to grant a remedy. App., at 34.

Filed July 16, 1992

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-5336

VINCENT JAMES LANDANO

v.

JOHN J. RAFFERTY,
Superintendent, Rahway State Prison;
IRWIN I. KIMMELMAN,
Attorney General of the State of New Jersey

State of New Jersey,
John J. Rafferty, Superintendent
East New Jersey State Prison,
Robert Del Tufo, Attorney
General of State of New Jersey,
Appellants

No. 91-5337

VINCENT JAMES LANDANO

v.

JOHN J. RAFFERTY,
Superintendent, East Jersey State Prison;
PETER PERRETTI,
Attorney General, State of New Jersey;
LESLIE FAY SCHWARTZ,
Deputy Attorney General;

THE OFFICE OF THE HUDSON
COUNTY PROSECUTOR;
KEARNY POLICE DEPARTMENT;
NEWARK POLICE DEPARTMENT;
JERSEY CITY POLICE DEPARTMENT; and
PERTH AMBOY POLICE DEPARTMENT

State of New Jersey,
John J. Rafferty, Superintendent
East New Jersey State Prison,
Robert Del Tufo, Attorney General
of State of New Jersey,
Appellants

On Appeal from the United States
District Court
For the District of New Jersey
(D.C. Civil Nos. 85-04777 and 89-02454)
Argued December 12, 1991

No. 92-5357

JOHN J. RAFFERTY, Superintendent,
East New Jersey State Prison, and
ROBERT DEL TUFO, Attorney General
of the State of New Jersey,

Appellants

v.

VINCENT JAMES LANDANO

On Appeal from the United States
District Court for the District of New Jersey

(D.C. Civil No. 91-1991)

Before: SLOVITER, *Chief Judge*,
SCIRICA and ROTH, *Circuit Judges*

(Opinion filed July 16, 1992)

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OPINION OF THE COURT

SLOVITER, *Chief Judge*.

This is the fourth time that this court has before it an aspect of the efforts by plaintiff-petitioner Vincent James Landano seeking a writ of habeas corpus awarding a new trial. Landano was convicted in 1977 in New Jersey state court on a charge of felony murder of a police officer

during the course of the robbery of a check-cashing establishment in New Jersey. In previous appeals to this court, we affirmed the district court's denial of a writ of habeas corpus, *Landano v. Rafferty*, 856 F.2d 569 (3d Cir. 1988), *cert. denied*, 489 U.S. 1014 (1989); reversed the district court's subsequent grant of a conditional writ of habeas corpus because we concluded Landano had failed to exhaust state remedies, *Landano v. Rafferty*, 897 F.2d 661 (3d Cir.), *cert. denied*, 111 S.Ct. 46 (1990); and, most recently, in related litigation, affirmed in part and reversed in part the district court's order granting Landano's request for certain information under the Freedom of Information Act in which Landano seeks to uncover potentially exculpatory material. *See Landano v. Rafferty*, 956 f.2d 422 (3d Cir. 1992).[1]

The present appeals are by defendants John J. Rafferty, Superintendent of East New Jersey State Prison, and Robert Del Tufo, Attorney General of the State of New Jersey, (collectively referred to as "the State") from two orders granting bail to Landano. The first order granting bail to Landano pending review of his petition for habeas corpus was entered by the district court on May 3, 1991. We heard argument on these appeals on December 12, 1991.

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[1] We also note that in Landano v. Rafferty, 859 F.2d 201 (3d Cir. 1988)(Per Curiam), we dismissed for lack of jurisdiction Landano's appeal on behalf of counsel from the district court's refusal to appoint Landano's counsel retroactively and denying counsel's request for waiver of the maximum allowable fee pursuant to the Criminal Justice Act, 18 U.S.C. § 3006A(b) and (d)(3)(1982 & Supp. IV 1986).

On February 4, 1992, while the appeal was *sub judice*, the district court ruled on matters previously pending before it, and issued an order denying the State's motion to dismiss Landano's petition for failure to exhaust, staying the petition for habeas corpus pending exhaustion in the state courts, and, as most relevant here, continuing Landano's enlargement on federal bail pending exhaustion of state remedies. *Landano v. Rafferty*, 782 F. Supp. 986 (D.N.J. 1992). The State sought to appeal this order by filing a petition for permission to appeal. We hold that there was insufficient legal basis for the district court's bail orders, and reverse.

I.

FACTS

This case has a long and complicated procedural history which is set forth in detail in this court's prior opinions, as well as in district court opinions[2] which in turn relied on state court opinions. We will recount the facts only insofar as they are relevant to the issues before us.

On August 13, 1976, in the course of a robbery of the Hi-Way Check Cashing Service in Kearny, New Jersey, by two gunmen, one gunman killed Newark Police Officer John Snow. A Hudson County grand jury indicted Landano along with Allen Roller, Victor Forni, and Bruce

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[2] *See* Landano v. Rafferty, 670 F.Supp. 570 (D.N.J. 1987), *aff'd*, 856 F.2d 569 (3d Cir. 1988), *cert. denied*, 489 U.S. 1014 and Landano v. Rafferty, 126 F.R.D. 627 (D.N.J. 1989), *rev'd*, 897 F.2d 661 (3d Cir.), *cert. denied*, 111 S.Ct. 46 (1990).

Reen, for felony murder, armed robbery, and other offenses related to the incident. The day before the scheduled trial of Roller and Landano, Roller pled *non vuit* to the felony murder charge and entered into a plea agreement with the Hudson County Prosecutor to testify against Landano at trial. Roller's testimony was highly damaging to Landano.

Roller testified at trial that the robbery was masterminded by a motorcycle gang known as "The Breed" which frequently organized robberies in the area around Staten Island, New York, and that Landano, although not a Breed member or affiliate, was recruited specifically for the Kearny robbery at Forni's suggestion. Roller stated that when he and Landano arrived at the Hi-Way Check Cashing Service trailer early in the morning of August 13, 1976, Roller went to the window of the trailer and forced his way inside while Landano waited outside. Meanwhile, Officer Snow arrived in a patrol car at the Hi-Way parking lot carrying an attache case containing $46,000 in cash which was to be delivered to the check-cashing establishment. Roller testified that after he took the cash drawer of the check-cashing establishment at gunpoint, he say Landano running from a police car carrying an attach [sic] case. When he and Landano got in the car after the event, Landano stated that he had to "ice [or waste] the cop." *Landano*, 670 F. Supp. at 574.

Joseph Pascuitti, an employee of an adjacent warehouse, testified that he saw a dark-haired man approach Officer Snow's patrol car, that a moment later he heard gunshots, and that when he turned back, he saw a green Chevrolet pull away with the same dark-haired man driving. Pascuitti described the dark-haired man as having

curly hair; he was not able to identify Landano as that man.

The attempt of the perpetrators to maneuver away from the crime scene in snarled traffic caught the attention of Raymond Portas, a truck driver stopped at an intersection. He testified that Landano was driving the car, but he was unable to identify Roller. This was the bulk of the evidence presented at Landano's trial linking him to the murder of Officer Snow. *Id.* at 574-75.

In May 1977, Landano was found guilty on all counts and was sentenced to life imprisonment and a consecutive seven to fifteen year term for the other offenses.[3] In June 1977, Landano filed a notice of appeal. In October 1978, Landano obtained an order remanding the case to the trial court for consideration of a motion for a new trial on the basis of newly discovered evidence. Judge Maurice A. Walsh Jr., J.S.C., found, after a hearing that the knowledge of evidence of prior robberies carried out by Roller and Forni could be imputed to the prosecutor, that it had been suppressed, and that had it been revealed at trial it " 'would have been probative in demonstrating, if Roller denied Forni's participation [in those robberies], that Roller was protecting Forni.' " *Id.* at 585 (quoting Opinion of Judge Walsh, December 1, 1978, Appendix Vol. I. at 36A). Nevertheless, the court concluded that the evidence, although "exculpatory," was not "material" within the meaning of *Brady v. Maryland*, 373 U.S. 83

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[3] Subsequently, Forni and Reen were tried together and acquitted of all charged except conspiracy to commit armed robbery. State v. Landano, No. 73-76, slip op. at 2 (N. J. Super. Ct. March 4, 1991)(letter opinion).

(1963),[4] because the outcome of the trial would not have been different had it been revealed. The trial court thus denied the motion for a new trial. The Superior Court of New Jersey, Appellate Division, both affirmed that denial and denied Landano's direct appeal, and the New Jersey Supreme Court denied certification in July 1980.

Landano subsequently filed for post-conviction relief in state court in March 1982, based on, *inter alia*, a recantation by Raymond Portas, the truck driver who had positively identified Landano, and another *Brady* claim. The details of Portas's recantation and the reasons therefor are fully set forth by the district court in *Landano*, 670 F.Supp. at 574-84. Hearings on these claims were conducted in June, September, October, and November of 1982 before Judge Joseph P. Hanrahan, J.S.C. Portas testified that he had failed to identify Landano from a photo display on the day of the crime but nevertheless, on April 15, 1977, eight months later, he initiated the back of a photograph of Landano after the detective stated " '[t]hat's the man we want.' " *Id.* at 576. Portas claimed that he had picked out a different photograph (possibly of Victor Forni, *see id.* at 578-79 n.5) which the prosecutor handed to someone who took it out of the room. Portas also stated at the post-conviction hearing that when he was in the courthouse right before trial, a detective told him that Landano had passed them in the hallway and stated " 'that's our man.' " *Id.* at 577. Portas testified that he had not recognized Landano.

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[4] In Brady v. Maryland, 373 U.S. 83, 87 (1963), the Court held that the suppression by the prosecutor of evidence material to the defendant's guilt is a violation of due process.

The state trial court denied the relief, finding Portas's recantation untrustworthy. *See id.* at 577-78. In January 1984 the Appellate Division denied Landano's appeal of that finding and in June 1984, the New Jersey Supreme Court denied certification.

Landano filed his first petition for habeas corpus in federal district court in New Jersey in October 1985, claiming a violation of his due process right to a fair trial based on Portas's recantation and the *Brady* claims he had raised in his motion for a new trial. The district court held an evidentiary hearing on September 2, 1987, and concluded that Portas "is a credible witness and further, that his recantation testimony is believable," *id.* at 579, and that the State's explanation of the missing photographs was "implausible." *Id.* at n.7. Nevertheless, because of the presumption of correctness for a state court's determination of factual issue under 28 U.S.C. § 2254(d)(1982), and the inapplicability of any of the exceptions to the presumption, the court deferred to the state court's determination that Portas was not a credible witness. The court also rejected Landano's claim that the State suppressed exculpatory and material evidence in violation of the requirements of *Brady*, and thus denied Landano's first petition for habeas corpus on the merits.[5] This court affirmed. *See Landano v. Rafferty*, 856 F.2d 569 (3d Cir. 1988).

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[5] The court also ruled on Landano's contention that the trial court issued a coercive *Allen* charge, *see Allen v. United States*, 164 U.S. 492 (1896), finding that, in context, the instruction was not so coercive as to deprive Landano of a fair trial and the right to a unanimous jury, *Landano*, 670 F.Supp. at 590.

In June 1989, Landano filed a motion under Fed. R. Civ. P. 60(b) to reopen the habeas proceeding because of fraud on the part of the prosecution concerning the suppression of evidence, and requested a temporary restraining order to obtain filed from the New Jersey Attorney General and the Hudson County Prosecutor. The court so ordered and Landano's counsel was permitted to review certain state documents.

Thereafter, Landano presented to the federal court allegedly exculpatory evidence of a handwritten document (the "ID on Landano") from the Kearny police files suggesting that Pascuitti and another potential witness, Christopher Calabrese, had rejected a photograph of Landano after stating that the suspect's hair was more curly, and a Kearny Police Department Continuation Report submitted by a Detective Rose which summarized a meeting with someone named either Joseph Pasapas or Basapas. Pasapas/Basapas apparently picked out a photograph of Victor Forni "as resembling the man who drove the car away."

After finding that Landano had exhausted his federal claims in state court, the district court reopened the habeas proceeding, invoking the "extraordinary circumstances" standard under Fed. R. Civ. P. 60(b)(6)[6] based on Landano's allegations that the State suppressed exculpatory evidence. *Landano v. Rafferty*, 126 F.R.D. 627, 638 (D.N.J. 1989). The court found that there was a violation of *Brady v. Maryland* because the evidence presented had

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[6] 6. Fed. R. Civ. P. 60(b) provides: "the court may relieve a party . . . from a final judgment . . . for . . . (6) any other reason justifying relief from the operation of the judgment."

been suppressed, was exculpatory, and was material because if the defense had known about it, it would have bolstered Landano's affirmative defense that Forni was the actual killer of Officer Snow. *Id.* at 644-54. Accordingly, the court granted a conditional writ of habeas corpus unless the state commenced a new trial within ninety days, and ordered Landano released on bail on July 28, 1989. *Id.* at 654.

The State appealed the conditional grant of the writ. In February, 1990, this court reversed the district court on the ground that Landano had not exhausted some of the claims on which the district court based its decision. *Landano*, 897 F.2d 661 (3d Cir.). *cert. denied*, 111 S. Ct. 46 (1990). We held that Landano must provide the state courts with the factual predicate for his legal theory as to why his constitutional rights have been violated so that the court could determine the materiality of the material suppressed. We stated that in making that determination, a court "must conduct a fact-sensitive examination of the precise nature of the suppressed information" so that it can make the "delicate judgment as to whether there is a reasonable probability that had the suppressed evidence been disclosed, the outcome of the trial would have been different." *Id.* at 670. Thereafter, the district court dismissed Landano's habeas petition.

Landano returned to state court and filed a petition for habeas corpus/post-conviction relief and bail. The bail was denied by Judge Walsh and that denial was affirmed on appeal. On November 15, 1990, however, the New Jersey Supreme Court, without an opinion, granted Landano, who was still at liberty at the time following the district court's earlier order granting Landano's writ of

habeas corpus, a stay of the arrest order pending a decision on his post-conviction relief petition. The status of this stay of arrest as bail *vel non* is an issue which the parties address but which we need not decide.

On March 4, 1991, Judge Walsh denied Landano's petition under New Jersey Rule of Criminal Procedure 3:22-1 for post-conviction relief, referring, *inter alia*, to the concession of Landano's counsel that everything he was asserting in this petition had already been previously presented to the state courts. Inasmuch as Rules 3:22-4 and 3:22-5 bar relief in post-conviction proceedings on grounds that either were not raised in prior proceedings (with exceptions) or for issues already adjudicated, Judge Walsh ruled that "it is evident that petitioner continues to raise issues and arguments which have long since been ruled on and supposedly disposed of under our New Jersey Court Rules." *State v. Landano*, No. 73-76, slip op. at 23 (N.J. Super. Ct. March 4, 1991) (letter opinion). Judge Walsh also ordered the parties to appear before the New Jersey Supreme Court on or before March 13, 1991, for a determination of whether Landano should continue on bail.[7]

The State immediately filed a motion in the New Jersey Supreme Court to lift the stay of arrest, apparently submitting with that motion a sworn statement, dated February, 15, 1991, that there had been "a full hearing on the merits of defendant's Post-Conviction Relief Application . . . before the honorable Maurice A. Walsh, Jr." *See*

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[7] Although Judge Walsh referred to it as bail, Landano's freedom at that point was actually due to the New Jersey Supreme Court's stay of arrest order.

Transcript of Proceedings, Civil Nos. 85-4777 and 89-2454 at 6 (D.N.J. March 12, 1991).

Landano, rather than appeal this ruling,[8] filed a successive petition for habeas corpus on March 11, 1991, arguing that Judge Walsh's opinion and the State's statement to the New Jersey Supreme Court demonstrated that he had exhausted his claims. Hours before the scheduled hearing before the federal court on March 12, 1991, the State asked Judge Walsh for a rehearing.

At the March 12 hearing before the federal court, Landano, fearful that the New Jersey Supreme Court would act on the State's latest request and lift the stay of arrest, sought federal bail.[9] He argued that because there is no New Jersey statutory provision for allowing bail

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[8] Landano argued that he had nothing from which to appeal in state court because he was not aggrieved by Judge Walsh's decision. As Landano's counsel stated, "I can hardly get up in front of the Appellate Division and lie and say, 'I don't think the issues were 'exhaustively tried.' ' " Transcript, March 12 at 3.

[9] Landano's counsel also complained about the State's inconsistent positions.

> They [the State] represented to the State Supreme Court that we had a full and fair hearing, but after learning we were coming here [to federal court], they swear in another affidavit that we will in the interest of justice require a hearing. That is playing fast and loose, so the State is estopped from claiming they didn't have a hearing.

Transcript, March 12 at 7.

pending post-conviction proceedings, there was "an absence of an available State corrective process or existence of circumstances rendering such process [ineffective] to protect the rights of the prisoner" under 28 U.S.C. 2254(b). Transcript, March 12 at 5-6.[10]

At the close of this hearing, the federal court denied the order to show cause why the writ should not be granted, but got the parties to agree that "no application will be made to arrest Mr. Landano until this Court has the opportunity to rule upon the pending application." Transcript, March 12 at 28. A consent order to that effect was entered on April 12, 1991.

On March 22, 1991, Judge Walsh conducted a hearing on the State's petition for rehearing from the March 4th order. On April 9, 1991, he issued a letter opinion, which he characterized as an "addendum" to his March 4th opinion, denying the State's motion for a full rehearing because the first hearing was "full" enough. Thus, the denial of post-conviction relief would stand. At the same time, the judge clarified his previous opinion by saying that the denial of relief as to three issues was based on their prior adjudication and

> the remaining issues consisting of the 'Basapas/ Pasapas report,' 'I.D. on Landano' document, additional evidence suppressed by the State,

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[10] The State's position at this hearing was that the court did not have jurisdiction because there were still ongoing state court proceedings, based on its application for a rehearing.

> and destroyed evidence are all based on conjecture, failing to impress this court enough to grant an evidentiary hearing.

Re: Vincent James Landano, No. 73-76, slip op. at 11-12 (N.J. Super. Ct., April 9, 1991) (letter opinion). The court again ordered the parties to appear before the New Jersey Supreme Court on the question of rescission of bail no later than April 11, 1991. Subsequently, on May 1, 1991, the New Jersey Supreme Court entered an order without explanation granting the State's motion to vacate the stay of arrest, effective May 2, 1991, at 5 p.m.

Landano returned immediately to federal court and filed a motion for bail and an order to show cause why a writ of habeas corpus should not be granted. The district court held a conference call and then an emergency hearing on the morning of May 2, 1991, expressing its displeasure at the prosecutor's failure to take action to prevent Landano's arrest.[11] The court orally ordered that Landano

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[11] In fact, the district court used what it believed was the State's obstreperousness as a basis for the subsequent bail order:

> Since the State will not consent, despite its earlier agreement to do so, and has expressed its intent to violate the order of this Court to which it consented, the Court *must fashion its own remedy* to grant the parties and the Court the time needed to prepare and consider the issues raised.

Transcript of Proceedings, Civil Nos. 85-4777 and 89-2454, at 30 (D.N.J. May 2, 1991) (emphasis added).

be released on bail in the custody of his attorney and under the supervision of the United States Pretrial Services.

This order, entered May 3, 1991, was subsequently explicated in the court's Order and Opinion dated May 6, 1991. At that time the court explained that it had granted bail pending habeas review of a state conviction under the authority of *Lucas v. Hadden*, 790 F.2d 365 (3d Cir. 1986), a case in which this court held that bail to a state prisoner pending federal habeas review was available in "extraordinary circumstances." The district court found that such extraordinary circumstances existed here to warrant bail.[12]

The argument before this court focused primarily on the authority of the district court to grant bail before it had determined whether the petitioner had exhausted his state remedies on the effect of the suppression of the newly discovered material relating to the "ID on Landano" and the "Pasapas/Basapas" documents.

On February 4, 1992, while the matter was pending here, the district court ruled on the still pending motion filed by the State to dismiss Landano's habeas petition for failure to exhaust state remedies as to the newly discovered material. The court found that Landano had failed to exhaust his remedies with regard to that issue, but it denied the State's motion to dismiss Landano's petition for a writ of habeas corpus, instead staying the habeas

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[12] The State's efforts to get a stay of the bail order on motion to this court was unsuccessful, and the matter was referred to a merits panel.

proceeding pending Landano's exhaustion of state remedies. In addition, the court ordered that Landano be continued on federal bail pursuant to its order entered May 3, 1991. Shortly thereafter, on February 14, 1992, the State filed a motion for permission to appeal from the order continuing Landano on federal bail, and this court docketed that petition as no. 92-8013.[13]

While the federal matter was proceeding as set forth, on March 12, 1992, the New Jersey Appellate Division acted on Landano's appeal from Judge Walsh's order denying an evidentiary hearing on new evidence (the "ID on Landano" and the "Basapas/Pasapas Report"). After reviewing the procedural sequence in the state and federal courts, the Appellate Division stated, "We believe that the record reflects the need for an evidentiary hearing relating to the prosecutor's conduct and its impact on the verdict." *State v. Landano*, A-4458-90TI, slip op. at 22 (N.J. Super. Ct. App. Div. March 12, 1992) (per curiam). The court continued, "If found to have merit, the 'newly discovered facts' resulting in new issues not raised . . . in prior state court proceedings may well impact on the previously considered issues." *Id.* The court stated that these were "extraordinary circumstances" which require that the procedural rules barring consideration of issues not previously raised and reconsideration of previously raised issues "must give way to fundamental fairness in this post-conviction proceeding." *Id.*

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[13] The State also sought reversal of the district court's denial of its motion to dismiss Landano's petition for habeas corpus.

The court directed Judge Walsh to hold an evidentiary hearing to consider the claims stemming from documentation that two people, including a witness at trial, failed to identify a photograph of Landano; the police department continuation report that a witness or witnesses identified Forni as the driver of the getaway car; and the failure to submit this information to Landano at or before his trial. The court also directed Judge Walsh to consider other claims including the impact of any lost or destroyed material.

We have been advised by counsel that pursuant to this direction, Judge Walsh has held an evidentiary hearing. To date no decision has been forthcoming. Under these circumstances, and because Landano remains at liberty on federal bail, we proceed to dispose of the State's appeal of the federal bail orders.

II.

Jurisdiction

The procedural sequence set forth gave rise to a series of motions in this court which we dispose of initially. Following the State's Petition for Permission to File an Appeal from the district court's order continuing Landano on bail, Landano filed a motion to dismiss that petition on the ground that the state had failed to comply with 28 U.S.C. § 1292(b) which requires that, prior to seeking permission for certification of an interlocutory appeal, applicant must first seek certification from the district court.

Landano is indeed correct that an appeal from an interlocutory decision cannot be taken to a Court of Appeals pursuant to 28 U.S.C. § 1292(b) unless the district court states in writing that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." Thus, were the order continuing Landano on bail an interlocutory order not otherwise appealable to this court, we would be required to deny the requested permission because of the absence of district court certification. However, that is not necessary in this case because rather than being an unappealable interlocutory order, the court's order granting bail pending disposition of a habeas petition is plainly appealable as a collateral order. *See United States v. Smith*, 835 F.2d 1048, 1050 (3d Cir. 1987). Thus, the appeal of the most recent bail order of February 4, 1992, and the prior appeals of the first bail order by the district court are before us in the same procedural posture, *viz.*, as orders for bail pending review of a petition for habeas corpus.[14] Therefore, as long as there was a timely notice of appeal, no permission by this court was needed.

The Petition for Permission to Appeal itself may be treated as a Notice of Appeal. In *Smith v. Barry*, 112 S. Ct. 678 (1992), the Supreme Court interpreted Rule 3 of the

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[14] The district court's denial of the State's motion to dismiss the successive habeas petition, on the other hand, is an interlocutory order, *see* United States v. Liotard, 817 F.2d 1074, 1077 n.4 (3d Cir. 1987), and, barring proper certification by the district court pursuant to 28 U.S.C. § 1292(b), we do not have jurisdiction to review it.

Federal Rules of Appellate Procedure to permit a brief which was the "functional equivalent" of a notice of appeal to substitute for a notice of appeal as long as "the filing provides sufficient notice to other parties and the courts." *Id.* at 682.[15] The State's Petition for Permission to Appeal contained all of the elements required by Fed. R. App. P. 3(c)[16] and was timely filed. Therefore, we may treat it as a notice of appeal of Judge Sarokin's Order of February 4, 1992, continuing Landano on federal bail.[17]

Also pending before us is a motion filed by Landano to dismiss appeal nos. 91-5336 and 91-5337 as moot, on the ground that the original order granting bail has since been superceded by the district court's order of February 4, 1992. We note that in the latter order the district court stated that it was *continuing* Landano on bail pursuant to the same terms and conditions of the previous bail order. Under these circumstances, we believe it is more expeditious to consolidate the appeals from the two orders

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[15] The filing of the motion for permission to appeal in the appellate court rather than the district court, as required by Fed. R. App. P. 3(a) is also not fatal to its effectiveness as a notice of appeal. *See* Fed. R. App. P. 4(a)(1); *Smith*, 112 S. Ct. at 682.

[16] Fed. R. App. P. 3(c) states in relevant part:

> The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken.

[17] We entered an order directing that the Clerk treat the petition for permission to appeal as a notice of appeal, and filed *nunc pro tunc*. This appeal has been docketed as no. 92-5357 and consolidated with appeal nos. 91-5336 and 91-5337.

rather than to dismiss appeal nos. 91-5336 and 91-5337 as moot.

We therefore turn to the merits. The grant of bail is discretionary with the district judge; this court's review is under the abuse of discretion standard.

III.

DISCUSSION

The issue presented is whether the requisite "extraordinary circumstances" exist for a grant of bail pending review by the federal court of Landano's habeas petition. Because the more recent appeal presents the case in its most up-to-date posture, we will reach it first and, in so doing, dispose of all appeals currently before us.

At the outset, it is necessary to distinguish between bail pending the district court's review of a petition for habeas relief and bail pending review by an appellate court of an order of the district court granting a writ of habeas corpus. The latter case is governed by Rule 23(c) of the Federal Rules of Appellate Procedure.[18] In *Hilton v.*

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[18] Rule 23(c) provides:

> Pending review of a decision ordering the release of a prisoner in such a proceeding, the prisoner shall be enlarged upon the prisoner's recognizance, with or without surety, unless the court or justice or judge rendering the decision, or the court of appeals or the Supreme Court, or a judge or justice of either court shall otherwise order.

Braunskill, 481 U.S. 770 (1987), the Supreme Court held that when a writ has issued, the court has discretion to release the prisoner using "the traditional standards governing stays of civil judgments," *id.* at 774, such as likelihood of success on the merits, irreparable injury, injury to other parties, and the public interest. *Id.* at 776.

On the other hand, when bail is sought by a prisoner who has been convicted in either state or federal court and the district court has denied the collateral relief sought, the standard for bail is, of course, more stringent. As Justice Douglas stated in denying an application for bail pending review by the court of appeals of the district court's denial of a petition for a writ of habeas corpus:

> This applicant is incarcerated because he has been tried, convicted, and sentenced by a court of law. . . . It is obvious that a greater showing of special reasons for admission to bail pending review should be required . . . than . . . in a case where applicant sought to attack by writ of habeas corpus an incarceration not resulting from a judicial determination of guilt.

Aronson v. May, 85 S. Ct. 3, 5 (1964) (chambers opinion); *see also* Fed. R. App. P. 23(b).

A third category of bail cases arises when the district court has pending, but has not yet decided, a petition for habeas corpus. In *United States v. Smith*, 835 F.2d 1048, 1050 (3d Cir. 1987), which presented such a situation, we applied the standards set forth in *Hilton*.[19] In *Calley v.*

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[19] Arguably, this standard was more liberal toward release from custody than warranted, inasmuch as *Hilton*, unlike

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Callaway, 496 F.2d 701, 702 (5th Cir. 1974), where the bail issue was presented in a similar posture, the court held that bail pending post-conviction habeas corpus review was available "only when the petitioner has raised substantial constitutional claims upon which he has a high probability of success, and also when extraordinary or exceptional circumstances exist which make the grant of bail necessary to make the habeas remedy effective." *See also Martin v. Solem*, 801 F.2d 324, 329 (8th Cir. 1986) (applying same standard).

Although *Smith* and *Calley* both concerned bail to a federal prisoner while a petition for habeas corpus was pending, there is precedent, including a direction by the Supreme Court, that affirms the authority of a federal court to grant bail to a state prisoner prior to ruling on the prisoner's petition for habeas corpus. *See In Re Shuttleworth*, 369 U.S. 35 (1962) (per curiam) (directing that after petitioner seeks bail from state court, district court should "proceed to hear and determine the cause, including any application for bail pending that court's final disposition of the matter"); *see also In re Wainwright*, 518 F.2d 173, 174 (5th Cir. 1975) (per curiam) ("In spite of the lack of specific statutory authorization, it is within the inherent power of a District Court of the United States to

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Smith, involved a prisoner who had been granted habeas. Because Smith confined himself on appeal exclusively to the showing of likelihood of success on the merits on the ground that a recent Supreme Court decision undermined all counts of his conviction, *see* 835 F.2d at 1050, there was no occasion to consider the exceptional circumstances issue.

enlarge a state prisoner on bond pending hearing and decision on his application for a writ of habeas corpus").

Our Court addressed the considerations to be taken into account in deciding whether to grant bail pending review of the habeas petition of a state prisoner in *Lucas v. Hadden*, 790 F.2d 365 (3d Cir. 1986). We stated that the factual predicate for the exercise of such power was a finding of "extraordinary circumstances." This "standard reflects the recognition that a preliminary grant of bail is an exceptional form of relief in a habeas corpus proceeding." *Id.* at 367.

Very few cases have presented extraordinary circumstances, and those that have seem to be limited to situations involving poor health or the impending completion of the prisoner's sentence. In *Johnston v. Marsh*, 227 F.2d 528 (3rd Cir. 1955), where we held that the district court considering a petition for habeas corpus by a state prisoner had inherent power to admit the prisoner to bail, we found that bail was warranted because the prisoner was "an advanced diabetic [who] was, under conditions of confinement, rapidly progressing toward total blindness." *Id.* at 529. Notably, the decision did not place the prisoner at liberty but instead released him to a hospital for immediate treatment.

Boyer v. City of Orlando, 402 F.2d 966 (5th Cir. 1968), illustrates the situation where bail has been awarded because the sentence was so short that if bail were denied and the habeas petition were eventually granted, the defendant would already have served the sentence. In that case, the Fifth Circuit directed the district court to release Boyer, who had been sentenced to 120 days in

prison, on bail while he exhausted in the Florida courts his constitutional claim that because he was indigent, he was entitled to court-appointed counsel in the misdemeanor case. Notably, the Fifth Circuit had recently decided in other cases that there was such a constitutional right. The court stated that it was obliged to take extraordinary action to make Boyer's exhaustion in the Florida courts truly effective, or his sentence would long have been served.

In light of the general principles reflected by the aforesaid authorities, we turn to examine the reasons given by the district court in this case in holding that Landano, a state prisoner, should be granted bail while he pursued his exhaustion of state remedies.

First, the district judge stated that it had " 'already determined that petitioner may be innocent of the charges for which he was convicted.' " *Landano v. Rafferty*, 782 F. Supp. 986, 992 (D.N.J. 1992) (quoting *Landano v. Rafferty*, No. 91-1881, slip op. at 7 (D.N.J. May 6, 1991) (supplemental opinion and order)). The judge referred to his earlier discussion of the nature of the alleged exculpatory evidence which Landano had claimed was suppressed by the State during the trial, appearing in *Landano*, 126 F.R.D. at 644-45.

Second, the district judge stated that New Jersey has no provision for bail pending a petition for post-conviction relief, thereby making it impossible that Landano could get his desired relief, i.e., bail, through state proceedings. *Landano*, 782 F. Supp. at 993. The court stated next that the State has admitted that Landano posed no

risk of flight, *id.*, and in fact "has demonstrated a commitment to 'clearing his name' " In addition, in its earlier opinion of May 6, 1991, the district court found "that the state has acted at a level of bad faith sufficient to require this extraordinary form of relief." *Landano*, No. 91-1881, slip op. at 8. In particular the court referred to the attempt by the State's officers to arrest Landano as soon as the New Jersey Supreme Court lifted its stay of arrest, even though the prosecutor had previously consented to the district court's order not to arrest Landano pending the court's action on Landano's habeas petition.

Finally, the court stated that the State had engaged in "prosecutorial maneuvering" that "could, if encouraged have the effect of contributing to inordinate delays in the processing of [Landano's] claims for relief." *Landano*, 782 F. Supp. at 994.

We find the district court's analysis problematic. Taking the last reason first, it is far from clear that the prosecution can be faulted for creating any inordinate delays. The district court never previously made such a charge in any of its opinions. It is true that the state courts took a different view of the facts and applicable law than that held by the district court and thus the final disposition of this matter may seem overly extended to the district court, but we cannot see how this result, endemic to exhaustion of state remedies, would justify bail. No case, including *Glynn v. Donnelly*, 470 F.2d 95 (1st Cir. 1972), relied on by the district court, holds that the delay resulting from exhaustion of state remedies is a special circumstance warranting federal bail. In any event, this reason given by the district court is disposed

of by Landano's brief on appeal which expressly disclaims delay as an "extraordinary circumstance."

We also believe that the absence of bail in New Jersey is not an extraordinary circumstance warranting federal bail. The parties agree that New Jersey does not provide for bail pending review of post-conviction motions of convicted felons. *See State v. Rose*, 210 A.2d 793, 794 (N.J. Super. Ct. Law Div. 1965).[20] Nevertheless, there is no federal constitutional right to bail pending appeal of a state conviction, *see Finetti v. Harris*, 609 F.2d 594, 597 (2d Cir. 1979); *Marks v. Zelinski*, 604 F.Supp. 1211, 1213 (D.N.J. 1985) (citing *Finetti*), and therefore it would be anomalous to regard its absence as an extraordinary circumstance. Furthermore, the New Jersey Supreme Court's action in staying the arrest of Landano after this court reversed the district court's grant of the writ was a procedure analogous to bail and served the same purpose. In fact, it was only after this stay was vacated on May 2, 1991, that the district court felt it necessary to grant bail.

The district court's reliance on Landano's possible innocence raises different considerations. In *McClesky v. Zant*, 111 S. Ct. 1454, 1470 (1991), the Court reiterated that a federal court may grant a writ of habeas corpus to a petitioner to avoid a "fundamental miscarriage of justice" when "a constitutional violation probably has caused the conviction of one innocent of the crime." *See also Murray v. Carrier*, 477 U.S. 478, 496 (1986) courts in "extraordinary case" may excuse the petitioner from showing cause for

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[20] Absent a decision to that effect by the New Jersey Supreme Court, we take no position as to whether the absence of an explicit provision for bail means that bail is unavailable.

procedural default "where a constitutional violation has probably resulted in the conviction of one who is actually innocent"); *Smith v. Murray*, 477 U.S. 527, 537 (1986) (discussing doctrine in context of procedural default at sentencing phase); *Sawyer v. Whittley*, 60 U.S.L.W. 4655 (U.S. June 22, 1992) (same).

We find two problems with the district court's reliance on Landano's probable innocence as a basis for bail. First, the "probable innocence" cases arise in the context of granting the writ, not granting bail. Second, and more important, that line of cases addresses the federal court's right to overlook a procedural default, not a failure to exhaust state remedies. When the State has not completed its review of the petitioner's claims, it is inappropriate for a federal court to reach the merits of petitioner's case in ruling on a motion for bail.

The Supreme Court has emphasized that even in cases where a clear violation of the petitioner's rights was found, "considerations of federal-state comity would still inhere, and it would be unseemly in our dual system of government for the federal courts to upset a state-court conviction without affording the state courts the opportunity to correct a constitutional violation." *Duckworth v. Serrano*, 454 U.S. 1, 4 (1981) (per curiam). *See also Caswell v. Ryan*, 953 F.2d 853, 857 (3d Cir. 1992) (as a matter of comity, exhaustion " 'should be strictly adhered to because it expresses respect for our dual judicial system' " (quoting *Landano*, 897 F.2d at 668)), *cert. denied*, 60 U.S.L.W. 3798 (U.S. May 26, 1992). As we noted in *Lucas*, "We doubt that it is appropriate to grant bail prior to ruling on a state habeas petition solely on the ground that there is a high likelihood of success on the merits. . . . " 790 F.2d at 367.

As to the district court's impatience with the State's unwillingness to permit Landano to remain at liberty, we know of no principle that would require a state prosecutor to agree to order the Department of Corrections not to arrest a defendant when there is no legal impediment to such rearrest. In light of the above, the district court's reliance on the small risk of Landano's flight would also not seem to rise to an extraordinary circumstance.

Although the district court purported to rely on *Lucas* as the principal authority warranting its decision that Landano had shown extraordinary circumstances, we believe that an analysis of *Lucas* leads to the opposite conclusion. In *Lucas*, this court held unanimously that the district court had improperly admitted the state prisoner to bail, inasmuch as the prisoner had failed to exhaust state remedies. In this case, the opinion of the Appellate Division of the New Jersey Supreme Court directing the state trial court to hold an evidentiary hearing demonstrates the Appellate Division's understanding and appreciation of the relevance of the newly found material that was suppressed. Under these circumstances, there is no reason for a federal court to intrude by directing that Landano be released on bail. Such a decision can be made, either as on bail or as a stay of arrest, by the New Jersey courts if they deem it appropriate.

Although the district court's decision on bail is one that should be accorded discretion, we are satisfied that the district court gave inadequate weight to the important comity considerations that apply when a state court is reviewing the substance of the claim that its proceedings deprived the prisoner of a constitutional right. We

thus conclude that Landano has not made the necessary showing of exceptional circumstances warranting bail.

IV.

Conclusion

For the reasons set forth, we will reverse the district court's orders granting bail and remand with directions that the district court turn the custody of Landano over to the appropriate state officials. Each party to bear its own costs.

SCIRICA, *Circuit Judge*, dissenting.

In this circuit, a habeas corpus petitioner may be granted bail pending disposition of his petition where "extraordinary circumstances" are present. *Lucas v. Hadden*, 790 F.2d 365 (3d Cir. 1986). Here, the district court based its finding of extraordinary circumstances in part on a finding of probable innocence.[1] Because I

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[1] On July 27, 1989, the district court found that there was a "distinct possibility that [Landano], indeed, may be innocent of the charges for which he was convicted," and that there was "a substantial probability . . . that the jury's verdict would have differed had [the suppressed evidence] been brought out at trial." *Landano v. Rafferty*, 126 F.R.D. 627, 649, 654 (D.N.J. 1989), *rev'd on other grounds*, 897 F.2d 661 (3rd Cir. 1990), *cert. denied*, 111 S. Ct. 46 (1990). On May 6, 1991, and February 4, 1992, the district court found that Landano "may be innocent of the charges for which he was convicted." *Landano v. Rafferty*, Nos. 85-4777, 89-2454, slip op. at 7 (D.N.J. May 6, 1991); *Landano v. Rafferty*, 762 F. Supp. 986, 993 (D.N.J. 1992). The district court is not alone in this view. A judge of this court has stated that "the

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believe a finding of probable innocence should override usual considerations of comity even when there is a lack of exhaustion, I respectfully dissent.

The majority "believe[s] that an analysis of *Lucas* leads" to the conclusion that no extraordinary circumstances justifying the district court's grant of bail are present here. Majority typescript at 29. I cannot agree. Landano, unlike Lucas, raises federal constitutional claims in his habeas petition. More importantly, the district court found, based on newly discovered evidence, that Landano "may be innocent of the charges for which he was convicted" and has "a likelihood approaching certainty of success on the merits." *Landano v. Rafferty*, 762 F. Supp. 986, 993 (D.N.J. 1992).

Lucas involved a petitioner who alleged that upon his release on parole from federal prison, he was wrongly recommitted to state prison to serve a term that had run concurrently with his federal term. He "asserted no constitutional violation nor did he identify any violation of federal law that was alleged to be the cause of his confinement." *Lucas*, 790 F.2d at 366. Furthermore, Lucas, who had pleaded guilty to federal narcotics violations, made no showing of probable innocence. In that context, we stated: "We doubt that it is appropriate to grant bail

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(Continued from previous page)

State's case (against Landano), erected upon a house of cards, has little, if any, credible foundation to it." *Landano*, 897 F.2d 685 (Roseon, J. dissenting). The *Landano* majority stated that it "join[ed] with the district court in finding Landano's new allegations deeply troubling," *id.* at 675 n.23, but held that Landano had failed to exhaust his state remedies.

prior to ruling on a state habeas petition solely on the ground that there is a high likelihood of success on the merits, especially absent exhaustion of state remedies." *Id.* at 367.

The circumstances here are fundamentally different from those in *Lucas*. Landano alleges that his conviction was unconstitutionally obtained through coerced testimony and the State's suppression of exculpatory evidence, and has convinced the district court of his probable innocence.

The Supreme Court has recognized a crucial distinction in its habeas corpus jurisprudence between a likelihood of success on the merits and a probability that a constitutional violation has resulted in the conviction of an innocent person. Generally, petitioners are denied federal habeas relief in cases of procedural default,[2] abuse of the writ,[3] or failure to develop a claim in state-court proceedings.[4] unless they can show cause and prejudice. However, these failings are excused in those "extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime." *McCleskey v. Zant*, 111 S. Ct. 1454, 1470 (1991). The Supreme Court's "probable innocence" or "miscarriage of justice" exception applies where a petitioner " 'establishe[s] that under the probative evidence he has a colorable claim of factual innocence,' " *i.e.*, where there is " 'a fair probability that, in light of all the evidence, including any

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[2] *Murray v. Carrier*, 477 U.S. 478 (1986).

[3] *McCleskey v. Zant*, 111 S. Ct. 1454 (1991); *Wise v. Fulcomer*, 958 F.2d 30 (3d Cir. 1992).

[4] *Keeney v. Tamayo Reyes*, 112 S. Ct. 1715 (1992).

alleged to have been illegally admitted (but with due regard to any unreliability of it) and evidence tenably claimed to have been wrongly excluded or to have become available only after the trial, the trier of the facts would have entertained a reasonable doubt of his guilt.' " *Sawyer v. Whittley*, 60 U.S.L.W. 4655, 4657 (U.S. June 22, 1992) (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 454-55 (1986); other citation omitted). Because the district court here found "a substantial probability . . . that the jury's verdict would have differed had [the suppressed evidence] been brought out at trial," and that Landano "may be innocent of the charges for which he was convicted," *see supra* note 1, the probable innocence exception should apply.

The majority distinguishes the Supreme Court's probable innocence cases on the ground that those cases address "the federal court's right to overlook a procedural default, not a failure to exhaust state remedies." Majority typescript at 28. I believe this distinction is immaterial.

The probable innocence exception to the cause and prejudice requirement embodies the Court's belief that "the principles of comity and finality that inform the concepts of cause and prejudice 'must yield to the imperative of correcting a fundamentally unjust incarceration.' " *Murray v. Carrier*, 477 U.S. 478, 495 (1986) (quoting *Engle v. Isaac*, 456 U.S. 107, 135 (1982)). Yet, the majority says that "[w]hen the State has not completed its review of the petitioner's claims, it is inappropriate for a federal court to reach the merits of petitioner's case in ruling on a motion for bail." Majority typescript at 28. I can discern no reason why comity will not prevent correction of a

fundamental miscarriage of justice in the context of procedural default, abuse of the writ, or failure to develop a claim, but will preclude relief absent exhaustion.

Moreover, the relief granted by the district court here poses little threat to comity. The doctrine of comity " 'teaches that one court should defer action on causes properly within its jurisdiction until courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter.' " *Rose v. Lundy*, 455 U.S. 509, 518 (1982) (quoting *Darr v. Burford*, 339 U.S. 200, 204 (1950)). The parties agree, and the district court found, that New Jersey does not provide for bail in cases like this one. *See Landano*, 782 F. Supp. at 995. Therefore, as the district court noted, there is no "affront to the state courts in this court retaining jurisdiction solely in order to extend bail, since New Jersey courts could not 'pass upon the matter' in any case." *Id.* Furthermore, because the district court held that Landano had not exhausted his state remedies, and therefore did not grant Landano's petition for writ of habeas corpus, the New Jersey courts will be afforded the first opportunity to correct their own constitutional errors, if any, as comity requires. In any event, *Lucas* states that comity must give way under "extraordinary circumstances."

Although "a preliminary grant of bail is an exceptional form of relief in a habeas corpus proceeding," *Lucas*, 790 F.2d at 367, our standard of review is abuse of discretion. I believe the district court did not abuse its discretion in holding that the factors it cited, especially

Landano's probable innocence, justified the grant of bail pending exhaustion of state remedies.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

VINCENT JAMES LANDANO, Petitioner, v. JOHN J. RAFFERTY, Superintendent East New Jersey State Prison, and ROBERT DEL TUFO, Attorney General of the State of New Jersey, Respondents.	Civil Action Nos.[1] 91-1881(HLS) 85-4777 89-2454 SUPPLEMENTAL OPINION AND ORDER (ORIGINAL Filed May 6, 1991)

Sarokin, District Judge

Before the court is petitioner's motion for bail pursuant to 28 U.S.C. § 2254(b) and for an order to show cause why his petition for a writ of habeas corpus should not be granted. The court heard argument on this matter at 10 a.m. on Thursday, May 2, 1991 and issued an order granting petitioner's motion for bail but denying the order to show cause at approximately 12 noon that same day. At that time, the court issued a brief opinion from the bench which explained the basis for the court's rulings. The court hereby supplements its opinion in light of

[1] The court has utilized the above docket numbers but finds that a new docket number should have been assigned the petition filed on March 11, 1991.

the expedient nature in which these matters were handled and the complexity and importance of the issues at stake.

Background

Prior to this pending habeas petition, petitioner had filed two previous habeas petitions, docketed as Civ. No. 85-4777 and Civ. No. 89-2425, in 1985 and 1989, respectively. The 1985 petition was denied. This court granted the 1989 petition on July 27, 1989, and petitioner has been at large since that date. However, the issuance of the writ was reversed by the Third Circuit Court of Appeals based on petitioner's failure to exhaust his state remedies. *Landano v. Rafferty*, 897 F.2d 661 (3d Cir. 1991). In accord with the Third Circuit's mandate, this court dismissed the 1989 petition on October 30, 1991, and vacated all orders which had been entered.

Since that date, petitioner returned to the Superior Court of New Jersey, Judge Walsh presiding, and filed a petition for post-conviction relief in accordance with the Third Circuit's mandate. By his Opinion dated March 4, 1991, Judge Walsh denied petitioner's request for post-conviction relief without an evidentiary hearing, reasoning that all of petitioner's claims "had been exhaustively litigated" and were barred under N.J. Rule 3:22-5, which prohibits re-litigation of issues previously decided.

On March 11, 1991, petitioner notified chambers that he intended to file an order to show cause why his petition for a writ of habeas corpus should not be granted. The court scheduled the emergency hearing for March 12th. The court instructed petitioner to file papers

by the close of business on March 11th. Petitioner did so, but his papers were filed through the night box at 4:05 p.m., since the Clerk's Office closes at 4 p.m. Petitioner's papers consisted of a one-page Verified Successive Petition for a Writ of Habeas Corpus, which states: "the petitioner hereby incorporates and repeats as if fully set forth herein all claims set forth in his prior petition for habeas corpus as supplemented by this court's opinions and orders under docket numbers 85-4777 and 89-2454." Thus, the merits of petitioner's Successive Petition are identical to those of the 1989 petition. What was different, however, was the procedural posture of the petition vis-a-vis exhaustion in light of Judge Walsh's 1991 ruling.[2] These factors were explained in the order to show cause papers – not in the habeas petition. Petitioner filed his papers in the night box, and the Successive Verified Petition was stamped "filed" by the Clerk's Office. However, because the Office was closed, no new 1991 docket number was assigned. In spite of this clerical error, this court both then and in connection with the current application for bail considered the petition as new, and separate and independent of any earlier petition.

At the March 12th hearing, petitioner argued to this court that he agreed with Judge Walsh's finding that petitioner had previously exhausted his claims for post-conviction relief in state court. Therefore, petitioner

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[2] Petitioner also argued that what was "new" in this third petition was the representation by the State made before Judge Walsh that petitioner had previously litigated his "new evidence" claims, in direct conflict with the State's arguments before the Third Circuit.

argued that he could not appeal Judge Walsh's order, since petitioner was repeatedly on record as agreeing with it. Accordingly, petitioner argued that he was now entitled to return to the federal courts for post-conviction relief.

Susan Gyss, representing the Hudson County Prosecutor's Office ("the State"), arrived at the March 12th hearing, having submitted responding papers that morning. Ms. Gyss informed the court that just prior to arriving in federal court for the hearing, the State had filed with Judge Walsh a petition for rehearing. Ms. Gyss represented that in those moving papers, the State contended that Mr. Landano was entitled to an evidentiary hearing, even though he should not succeed on the merits. In light of this new development, this court denied petitioner's order to show cause for emergency relief, since the court was of the opinion that the state court should have an opportunity to consider the State's motion for rehearing. However, the court did not dismiss the petition, which was properly filed. In the interim, while the habeas petition was pending and prior to the State's Answer or a Motion to Dismiss the Petition for Failure to Exhaust, the court entered a Consent Order[3] whereby the State agreed that, in the event the New Jersey Supreme Court's stay of the arrest warrant was vacated, Landano "shall not be

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[3] The parties orally entered into the consent order at the March 12th hearing. A proposed form of order was subsequently submitted, which was signed on April 11, 1991 and filed on April 12, 1991.

returned to custody untii notice has been given to petitioner, through his counsel, and this Court has an opportunity *to rule* upon such application as the petitioner may submit." (emphasis added).

Judge Walsh heard argument on the State's motion for rehearing on March 22, 1991. By his April 8, 1991 Letter-Opinion, apparently Judge Walsh granted the State's motion for rehearing and issued a superseding opinion, again denying Landano an evidentiary hearing and denying Landano's petition on the merits.[4] By Judge Walsh's direction, the State then moved before the New Jersey Supreme Court to vacate that court's stay of the arrest warrant for Landano. On May 1, 1991, the New Jersey Supreme Court vacated the stay without opinion and ordered that Mr. Landano could be arrested as of 5 p.m. on Thursday, May 2, 1991. Thus, with his 1991 habeas still pending, Mr. Landano filed the current motion for bail and for an order to show cause why his habeas petition should not be granted by this court.

Discussion

As expressed in this court's May 2, 1991 bench opinion, the court finds that the 1991 habeas petition is pending before the court. To this date, the State has neither answered the petition nor moved to dismiss it, despite the State's repeated contention that Mr. Landano has not yet exhausted his state remedies. As the court expressed at the hearing, after affording the parties a full and fair opportunity to address this issue the court may well conclude that petitioner has not exhausted his state

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[4] The court did not have the benefit of this opinion or of any other papers or briefs when the bail application was made.

remedies. However, the court could not make such a determination absent appropriate submissions.

Lucas v. Hadden, 790 F.2d 365 (3d Cir. 1986), governs petitioner's current motion for bail. In *Lucas*, a petition for a writ of habeas corpus was pending, although the court acknowledged that petitioner had not yet satisfied the exhaustion requirement. Petitioner's failure to exhaust did not affect the court's jurisdiction for purposes of granting bail; as the *Lucas* court noted, the exhaustion requirement is *not* jurisdictional. *Id.* at 367, *citing Strickland v. Washington*, 466 U.S. 668, 684 (1984). Although under 28 U.S.C. § 2254(b) a petition must be dismissed for failure to exhaust state remedies, a determination that a petitioner has not yet exhausted her state remedies is a determination on the merits of the petition. A court maintains jurisdiction over the petition pending that final determination. Neither an Answer or a Motion to Dismiss has been filed in this action, and the question of exhaustion, i.e., the impact of Judge Walsh's first March 1991 ruling, has never been briefed. The court therefore has jurisdiction to determine whether petitioner should be granted bail.

In *Lucas v. Hadden*, the Third Circuit stated that the "extraordinary circumstances" test is appropriate for determining whether a state habeas petitioner who has not exhausted state remedies is entitled to bail, recognizing that the preliminary grant of bail is an exceptional form of relief in a *habeas corpus* proceeding. In *Lucas*, the court acknowledged the inherent power of a federal habeas tribunal to admit a state petitioner to bail pending a ruling on the claims asserted in the petition. *Lucas*, 790 F.2d at 367, *citing* 28 U.S.C. § 2254(b).

The Third Circuit has not defined "exceptional" or "extraordinary" circumstances. The only case on record in which a federal court in this circuit has granted such bail is *Johnston v. Marsh*, 225 F.2d 528 (3d Cir. 1955), in which a petitioner was granted bail in order to receive treatment for diabetes. The instant case clearly presents exceptional and extraordinary circumstances which warrant the release of petitioner on bail. Although this court's writ of *habeas corpus* was reversed for failure to exhaust, and not on the merits, this court has already determined that petitioner may be innocent of the charges for which he was convicted.

Moreover, petitioner and respondent agree that the State of New Jersey provides no provision for bail pending resolution of an application for post-conviction relief in the state system. Accordingly, no matter how meritorious a petitioner's claim may be, and no matter what extraordinary and exceptional circumstances may arise which would warrant release on bail (e.g., medical necessity, etc.), no petitioner can be released on bail in New Jersey pending resolution of his petition.

Third, petitioner has been at large since this court issued the writ of *habeas corpus* on July 27, 1989, and, to the court's knowledge, has done nothing to suggest that he presents a risk of flight or a danger to the public. In fact, the state agrees that petitioner does not pose a risk of flight or a change to public safety. If anything, petitioner has demonstrated a commitment to "clearing his name", which requires him to endure the long and arduous course of legal process in New Jersey.

Finally, the actions of the Hudson County Prosecutor's Office, in requiring that this court act without benefit of a formal motion or briefing and in representing that it could not stop the arresting authorities from sending petitioner back to prison pending a hearing, also contribute to the circumstances which motivate this court's decision to grant bail pending receipt of the State's motion to dismiss the petition. The state's representations, including its representation that it would violate this court's order of March 12, 1991, which was entered by consent, strongly suggest that the state has acted at a level of bad faith sufficient to require this extraordinary form of relief.[5]

This confluence of factors strongly suggests to the court that this case presents "extraordinary circumstances" under *Lucas*, warranting the granting of bail for the limited purpose of affording the parties an opportunity to address, and the court an opportunity to decide,

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[5] On May 2nd while the court was in recess and just prior to the court's rendering of its determination on the bail application, the Deputy Courtroom Clerk received a telephone call notifying him that prison guards would be arriving momentarily to arrest Landano. The court then issued its ruling granting the bail application. At approximately 12:30 that day, just after the court rendered its ruling, two prison guards arrived at the court's chambers with handcuffs and leg irons seeking to take Mr. Landano into custody. These events occurred at least 4½ hours prior to the lifting of the stay of the arrest warrant by the New Jersey Supreme Court. The State's willingness to violate not only the consent order of March 12, 1991, but also the May 1st Order of the New Jersey Supreme Court was further evidence before the court of the State's bad faith in its handling of this matter.

the complex and novel issues of exhaustion raised by Landano's latest petition for relief.

Conclusion

Accordingly, bail is granted on the terms and conditions set forth in the court's order of May 2, 1991, and the Clerk of the Court is directed to assign a separate docket number to the petition filed on March 11, 1991 *nunc pro tunc*.

SO ORDERED.

/s/ H. Lee Sarokin
H. LEE SAROKIN, U.S.D.J.

Date: May 6, 1991

Original to: Clerk, U.S. District Court

Copies to: Ronald J. Hedges, U.S. Magistrate

Neil Mullin, Esq.
Smith, Mullin & Kiernan, P.C.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

VINCENT JAMES LANDANO, Petitioner, v. JOHN J. RAFFERTY, Superintendent East New Jersey State Prison, and ROBERT DEL TUFO, Attorney General of the State of New Jersey, Respondents.	Civ. No. 91-1881 (HLS) **OPINION** (ORIGINAL Filed Feb. 4, 1992)

Sarokin, District Judge

This case is a testament to the principle "Justice Delayed is Justice Denied." We must ask ourselves why the current clamor and rush to carry out death sentences, not no similar urgency in freeing one who might be wrongly convicted and confined.

Vincent James Landano has been up and down the judicial ladder enough times to exhaust anyone and destroy their spirit. Nonetheless, he has been ordered to resume the journey once again on the grounds that his current claims upon which this court granted him habeas corpus relief must receive further review by the state courts.

The futility and delay engendered by that process are self-evident. Either the state court will grant the relief which this court previously granted or, failing same, this

court will do so when the matter is returned to it – the same facts and law being presented. Thus, the petitioner, some one or two years hence, will be in the same position he was in on July 27, 1989, the day this court granted his petition. Then most certainly the appeals on the merits will commence.

Here is a man who has served over twelve years in prison and almost as many fighting for his freedom in our justice system. If one's liberty, once unconstitutionally taken, can only be restored after so many years of confinement and confoundment, then the Great Writ will be rendered worthless. Rather than crying out for speedy executions for those who have been convicted of capital crimes, we should be crying out for the prompt release of those who may have been wrongly convicted and confined – cries of freedom rather than death.

And now, despite all of the questions raised abut the petitioner's guilt and the prosecution's conduct, the State moves to have the petitioner returned to custody pending resolution of the state proceedings, by seeking dismissal of Landano's pending petition for habeas corpus relief.

Background

The factual and procedural histories of this case are long and complex. They have also been set out at length in previous opinions of this court and the Third Circuit issued at earlier stages of the present litigation.[1] The

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[1] This court's opinion of July 27, 1989 is set forth at 126 F.R.D. 627 (D.N.J. 1989). The Third Circuit's opinion, reversing this court's determination, is set forth at *Landano v. Rafferty*, 897 F.2d 661 (3d Cir. 1990), *cert. denied*, 111 S.Ct. 46 (1990).

court therefore incorporates its discussion of the factual and procedural background of this case in its opinions of July 27, 1989, May 2, 1991, and May 6, 1991.

It will be useful, however, to review briefly recent procedural events in this action to provide a context for the pending motion. After unsuccessfully pursuing a motion for a new trial and a petition for post-conviction relief in the state courts, petitioner Landano ("Landano") filed a petition for a writ of habeas corpus in this court. On September 29, 1987, this Court denied relief to petitioner, 670 F. Supp. 570 (D.N.J. 1987), *reconsideration denied*, 675 F. Supp. 204 (D.N.J. 1987), the Court of Appeals affirmed this decision, 856 F.2d 569 (3d Cir. 1988), and the United States Supreme Court denied certiorari. 489 U.S. 1014 (1989).

On June 8, 1989, petitioner sought and was granted an *ex parte* order by this court for the seizure of state files relating to this case. Based on information discovered in the seized files, Landano filed an Order to Show Cause with this court why a writ of habeas corpus should not issue. The court granted Landano's motion to reopen the court's prior judgment, pursuant to Rule 60(b), 126 F.R.D. at 638, found that Landano had satisfied his exhaustion requirements, *Id.* at 644, vacated its order denying Landano's petition, and issued a conditional writ of habeas corpus. *Id.* at 654. The court found that:

> New information has been presented to the court which demonstrates that evidence which may have exculpated the petitioner and inculpated another had been systematically withheld from the petitioner and his counsel.

Id. at 630. This information included a handwritten document from police files, indicating that two witnesses, one of whom testified for the prosecution at trial, had been shown only a photograph of Landano and failed to identify him as the perpetrator ("ID on Landano"); and a police department continuation report stating that a witness picked out a photograph of a different man, whom Landano had contended at trial to have been the perpetrator, as resembling a man seen driving the getaway car ("the Pasapas ID").

This court found that both documents had been suppressed and that either presented a substantial probability that the jury's verdict would have differed had the information contained within them been available to the defense at trial. Relying on *Brady v. Maryland*, 373 U.S. 83 (1963), the court concluded that Landano's fourteenth Amendment due process right to a fair trial had been violated by the prosecution's failure to turn over these documents, and that the suppression of each of them constituted an independent constitutional violation requiring granting of the writ. 126 F.R.D. at 654 & n.13.

The Court of Appeals for the Third Circuit reversed this determination, holding that Landano had failed to exhaust his state remedies with respect to the information uncovered in the seized files, and that no exceptional circumstances existed justifying suspension of the exhaustion requirement. 897 F.2d at 674-75. On November 1, 1990, Landano filed a new state petition for post-conviction relief. On November 15, 1990, the Supreme Court of New Jersey issued a stay of the arrest order for Landano, pending disposition of Landano's petition for post-conviction relief.

On February 4, 1991, defendants John J. Rafferty, Superintendent, East New Jersey State Prison, and Robert Del Tufo, Attorney General of the State of New Jersey, (collectively, "the State") filed an answer opposing Landano's petition. The grounds for their opposition, however, is disputed. Landano contends that defendants took the position that no state remedies were available to Landano for any of the issues addressed in his petition because all of them had been exhaustively litigated in prior state proceedings; the State now denies it argued that Landano had exhausted his state remedies. In a letter dated February 7, 1991, Landano indicated that he had argued before the Third Circuit that his state remedies were exhausted, but felt compelled by the third Circuit's mandate to seek a plenary hearing in state court. By letter dated February 7, 1991, the state responded, claiming that its prior submissions had not asserted that Landano had presented all his claims to the state court previously.

On March 8, 1991, the Honorable Maurice A. Walsh, Jr., J.S.C., dismissed Landano's petition without an evidentiary hearing. Landano contends that Judge Walsh's dismissal was based on a factual finding that all the claims Landano raised were barred as having already been litigated in the state courts. Based upon his view that this decision fulfilled the Third Circuit's mandate to exhaust his state remedies, Landano filed in this court on March 11, 1991 an order to show cause why a writ of habeas corpus should not issue, which this court treated as a new petition for habeas relief. Supplemental Opinion, No. 91-1881, Slip Op. at 3 (D.N.J. May 6, 1991) (Pet. Ex. at 1096A).

On March 12, before the scheduled hearing was to occur before this court, the State filed a notice of motion seeking a rehearing before Judge Walsh on the grounds that his prior decision had been defective in not recognizing that there existed a genuine unexhausted factual dispute concerning the "ID on Landano" and "Pasapas ID" documents, entitling Landano to a hearing on the merits. Because of the pendency of the State's motion for a rehearing, this court denied Landano's order to show cause, but did not dismiss the underlying petition. The State then consented on the record that no application would be made to arrest Landano until this Court had an opportunity to rule on his pending application.

On April 8, 1991, the Judge Walsh issued a second opinion, in which he stated that he had not previously held that the new issues raised by the "ID on Landano" and the "Pasapas ID" had been barred by previous state court litigation. Letter Opinion, Ind. No. 73-76, Slip Op. at 5-6 (N.J. Super. Ct. April 8, 1991) (Pet. Ex. 1009A-10A). Judge Walsh further stated that his earlier opinion had found, based on a "hearing on the merits," that the "so-called new issues" would not have caused any change in the guilty verdict, even if they were found to have involved prosecutorial misconduct. *Id.* at Slip Op. 3-4 (Pet. Ex. 1008A-09A). Hence, he stated, his denial of Landano's petition regarding the new issues had been on the merits, not due to their prior litigation. Judge Walsh then denied the state's motion for rehearing or clarification. Landano filed a notice of appeal of Judge Walsh's decision in the Appellate Division on May 14, 1991.

On April 19, 1991, the State moved before the New Jersey Supreme Court to dissolve its stay of the arrest

order. On May 1, 1991, the Supreme Court vacated the stay without opinion and ordered that Landano could be arrested as of 5 p.m., May 2, 1991.

The same day, Landano's counsel contacted this court to arrange a hearing, as had been contemplated when the parties appeared before the court on March 12, at which time the state had consented that "no application to place Mr. Landano in custody shall be made until notice has been given to [Landano's counsel] and an opportunity afforded to him to be heard by this Court." Transcript of Order to Show Cause Proceeding, No. 89-2454, at 3 (D.N.J. May 2, 1991) (Pet. Ex. 1061A). In order to arrange this hearing, the court scheduled a conference call with all parties for the following morning. In that conference, counsel for the State informed the court that the prosecutor would not honor its agreement and would not comply with the order, and claimed that it was without power, ability, or authority to prevent the arrest of Landano by the Department of Corrections.

Upon hearing that the state intended to act in contempt of this court's order, the court ordered all parties to appear before it at 10:00 a.m. on May 2, 1991, for argument. At that time, Landano filed an order to show cause why a writ of habeas corpus should not issue with temporary restraints in the form of federal bail. This court declined to rule on Landano's habeas petition on an exigent basis, but granted bail, issuing an opinion from the bench supplemented by a written opinion, issued May 6, 1991.

The State filed a notice of appeal and moved for stay of the bail order. The stay of the bail order has been

denied; the appeal of this court's order is currently pending before the Third Circuit.

On May 31, 1991, the State filed an answer to Landano's successive petition for habeas corpus, filed on March 11, 1991. The state's answer was accompanied by the motion to dismiss which the court addresses herein.

Discussion

Landano's renewal of his petition for habeas relief on March 11, 1991 was premised on his view that the Third Circuit's mandate that he exhaust available state remedies had been satisfied by the state court proceedings he instituted on November 1, 1990 Although Landano's appeal of the trial court's denial of his petition for post-conviction relief is still pending before the Superior Court of New Jersey Appellate Division, Landano contends that the exhaustion requirement has been satisfied by Judge Walsh's determination, in his first opinion, that "all issues" in Landano's state petition had previously been submitted to state court, and by the state's alleged initial position, in its answer to Landano's state petition, that Landano was barred because all of his claims had been adjudicated in prior state proceedings. Pet. Brief at 32.

The state has now moved to dismiss Landano's petition on the grounds that Landano has failed to exhaust his state remedies. The State disputes Landano's factual claims, contending that the State has never questioned that the "ID on Landano" and the "Pasapas ID" were new issues, not previously litigated in state court, and that Judge Walsh's first opinion recognized that these claims

were not exhausted.[2] Resp. Brief at 26, 28. Further, the State argues that Landano is not entitled to federal bail under the "extraordinary circumstances test" of *Lucas v. Hadden*, 790 F.2d 365 (3d Cir. 1986).

In opposition to the State's motion, Landano makes three arguments: (1) that in light of its initial position before Judge Walsh, the State is barred by the doctrine of judicial estoppel from asserting the non-exhaustion defense; (2) that comity requires this court to reach the merits, since both the State and the state courts have allegedly acted in bad faith to interfere with this court's jurisdiction; and (3) that petitioner is excused from the exhaustion requirement because the state judicial system, not providing any post-conviction relief in the form of bail, is ineffective to protect his rights. Pet. Brief at 46-56.

Exhaustion of State Remedies

The legal standard governing the availability of federal habeas relief is codified at 28 U.S.C.A. § 2254:

> An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

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[2] Respondent also argues that Landano is time-barred from seeking relief under Fed. R. Civ. P. 60(b). Resp. Brief at 36.

> Any applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

The court addresses the issues presented on this motion mindful of its responsibility to treat the Court of Appeals' decision as the law of the case, having reversed this court's earlier determination that exhaustion had occurred.

Judicial interpretation of the federal habeas statute has made clear that the exhaustion requirement is not jurisdictional, but "arises rather from interests of comity between the state and federal systems." *Landano v. Rafferty*, 897 F.2d 661, 668 (3d Cir. 1990), *cert. denied*, 111 S. Ct. 46 (1990) (citation omitted); *see also Rose v. Lundy*, 455 U.S. 509, 515 (1982) (comity is the basis for the exhaustion doctrine). Nevertheless, although not jurisdictional, the exhaustion rule is "to be strictly enforced." *Strickland v. Washington*, 466 U.S. 668, 679 (1984).

Under this standard, the court finds Landano's arguments regarding the merits of his petition unconvincing. First, Landano has not established he is entitled to exemption from the exhaustion requirement based on an "absence of available state process" or "circumstances rendering such process ineffective." Judge Walsh's April 8 Opinion makes clear that Landano's petition for post-conviction relief based on the newly discovered evidence was denied on the merits. The ordinary state appellate process is now available to Landano; indeed, he has already filed an appeal.

The general rule of requiring exhaustion where a state corrective process is available is not "rigid and inflexible." As the United States Supreme Court has said, "district courts may deviate from" the general rule requiring exhaustion and "grant relief in special circumstances:"

> Whether such circumstances exist calls for a factual appraisal by the court in each special situation. Determination of this issue, like others, is largely left to the trial courts subject to appropriate review by the courts of appeals.

Frisbie v. Collins, 342 U.S. 519, 520-21 (1952). Landano, however, has not demonstrated a basis for waiving the exhaustion requirement under *Frisbie's* "special circumstances" test. As the Third Circuit said, " '[e]xhaustion- . . . serves an interest *not* of state prosecutors but of state courts;' . . . [t]herefore, an exception 'punishing' the prosecutor for misconduct by withholding the exhaustion defense would clearly not serve the interest of comity." *Landano*, 897 F.2d 661 (*quoting U.S. ex rel. Trantino v. Hatrack*, 563 F.2d 86, 96 (3d Cir. 1977), *cert. denied*, 435 U.S. 928 (1978)) (rejecting view that systemic, bad faith suppression of exculpatory evidence constitutes waiver of non-exhaustion argument). Regarding Landano's argument that the State is judicially estopped from raising non-exhaustion, the court observes that the exhaustion requirement is premised on respect for the state courts and is not based upon the arguments or actions of the prosecution. Hence, even if the state has taken inconsistent positions before federal and state courts which might, in other circumstances, bar it from raising a defense, such conduct would not by itself excuse this

court from determining whether plaintiff has exhausted his state remedies. *Cf. Granberry v. Greer*, 481 U.S. 129, 133 (1987) (state's failure to raise non-exhaustion defense until appeal of adverse habeas determination in district court did not constitute absolute waiver).

Likewise, the comity doctrine itself does not require this court to disregard the availability of state process as Landano contends. Once again, a prosecutor's failings, whether in suppressing exculpatory evidence or taking inconsistent positions before different courts, cannot justify this court in refusing to defer to the state courts on matters properly within their jurisdiction, where they have not yet had an opportunity to pass on the matter. *See Ex parte Hawk*, 321 U.S. 114, 118 (1944). This court also finds no basis for denying deference to the state court by virtue of the fact that a superseding opinion appears to contradict a prior one, no matter how markedly.

Finally, Landano has not carried the burden of establishing that he has in fact exhausted his state claims. This court has no grounds for disregarding Judge Walsh's opinion of April 8, 1991, in which he clearly stated that consideration of the "ID on Landano" and "Pasapas ID" issues was not precluded under the New Jersey rule barring relitigation where a ground of relief has been determined on the merits in a prior adjudication. N.J. Rule Crim. P. 3:22-5. Landano is not precluded from appealing Judge Walsh's adverse determination in the state courts.

Federal Bail

The court therefore concludes that Landano has failed to exhaust his state remedies with regards to claims based on the "ID on Landano" and "Pasapas ID" documents. Landano's exclusive avenue for pursuing these claims lies, for the present, in the state courts. The availability of bail, however, raises a different issue. The Third Circuit has recognized "the inherent power of a federal habeas tribunal to admit a state petitioner to bail pending a ruling on the claims asserted in the petition." *Lucas v. Hadden*, 790 F.2d 365 (3d Cir. 1986) (*citing United States ex rel. Slough v. Yeager*, 449 F.2d 755 (3d Cir. 1971); *Johnston v. Marsh*, 227 F.2d 528 (3d Cir. 1955)). In the Third Circuit, the "extraordinary circumstances" test provides the "standard by which to determine when bail may be granted to a habeas petitioner prior to a ruling on the merits of the petition." *Lucas*, 790 F.2d at 367.

Thus, in *Johnson v. Marsh*, federal bail was granted where a petitioner was extremely ill and sought to be admitted to a hospital pending resolution of his habeas petition. 227 F.2d 528; *see also Woodcock v. Donnelly*, 470 F.2d 93, 94 (1st Cir. 1972). Further, the Third Circuit has made clear that a habeas petitioner's poor health is not the only extraordinary circumstances "that may justify a grant of bail prior to disposition of the habeas petition." *Lucas*, 790 F. 2d at 367. Other circuits, for example, have indicated that "extraordinary circumstances" may include short sentences too near their completion to make collateral review an effective remedy, *see, e.g., Calley v. Callaway*, 496 F.2d 701, 702 n.1 (5th Cir. 1974), *application denied*, 418 U.S. 906 (1974); *Noyd v. Bond*, 395 U.S. 683, 689 (1969); *Levy v. Parker*, 396 U.S. 1204 (1969); *Boyer v. City of*

Orlando, 402 F.2d 966 (5th Cir. 1968), and extraordinary delay in processing a habeas petition. *Glynn v. Donnelly*, 470 F.2d 95 (1st Cir. 1972); *cf. Landano*, 897 F.2d at 675, n.23 (inexcusable or inordinate delay by the state in processing petitioner's claims for relief would permit petitioner to seek relief in federal court notwithstanding failure to exhaust state remedies).

In its prior opinion ruling on Landano's request for bail, this court found that Landano's case "clearly presents exceptional and extraordinary circumstances which warrant the release of petitioner on bail." *Landano v. Rafferty*, Supplemental Opinion and Order, Civ. No. 91-1881 (D.N.J. May 6, 1991), Slip Op. at 7 (Pet. Ex. 1100A). This court's May 6 opinion listed four factors cumulatively satisfying *Lucas'* "extraordinary circumstances" test. First, this court has already determined, in its opinion of July 27, 1989, that petitioner may be innocent of the charges for which he was convicted; accordingly petitioner has in the view of this court a likelihood approaching certainty of success on the merits.[3] Second,

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[3] For a discussion of the merits of Landano's petition, based on the newly discovered evidence, see *Landano v. Rafferty*, 126 F.R.D. at 644-54. The Third Circuit has stated that "[w]e doubt that it is appropriate to grant bail prior to ruling on a state habeas petition solely on the ground that there is a high likelihood of success on the merits, especially absent exhaustion of state remedies." *Lucas*, 790 at 367. However, this court finds it significant that the Circuit court did not state that likelihood of success was irrelevant to the appropriateness of bail. To the contrary, the carefully qualified conclusion that the granting of bail "*solely* on the ground that there is a high likelihood of success on the merits" is inappropriate, implies

(Continued on following page)

"petitioner and respondent agree that the State of New Jersey makes no provision for bail pending resolution of an application for post-conviction relief in the state system." Slip Op. at 7. Third, "petitioner has been at large since this court issued the writ of *habeas corpus* on July 27, 1989, and, to the court's knowledge, has done nothing to suggest that he presents a risk of flight or a danger to the public." *Id.* at 8. Fourth, respondent's actions themselves provided a reason for extending bail:

> . . . the actions of the Hudson County Prosecutor's Office, in requiring that this court act without benefit of a formal motion or briefing and in representing that it could not stop the arresting authorities from sending petitioner back to prison pending a hearing, also contribute to the circumstances which motivate this court's decision to grant bail pending receipt of the State's motion to dismiss the petition. The State's representations, including its representation that it would violate this court's order of March 12, 1991, which was entered by consent, strongly suggest that the state has acted at a level of bad faith sufficient to require this extraordinary form of relief.

Slip Op. at 8.

(Continued from previous page)

that the strength of petitioner's argument on the merits is properly taken into account as a factor to be weighed in determining the availability of bail, albeit not a sufficient ground in itself. Further, *Lucas* is distinguishable because the petitioner's claim therein did not involve allegations of egregious prosecutorial misconduct, as have been raised here.

Based on these factors, this court concluded that:

> [t]his confluence of factors strongly suggests to the court that this case presents "extraordinary circumstances" under *Lucas*, warranting the granting of bail for the limited purpose of affording the parties an opportunity to address, and the court an opportunity to decide, the complex and novel issues of exhaustion raised by Landano's latest petition for relief.

Id.

The benefit of further briefing on the legal and factual issues in this case have further satisfied the court that the four extraordinary factors identified in the court's May 6 opinion were factually and legally sound, and continue to apply to petitioner with undiminished force. Accordingly, the court concludes that the *Lucas* "extraordinary circumstance" test is no less satisfied now then when Landano presented his emergency application for bail to this court in May 1991.

Moreover, the court concludes that the basis for extending bail to Landano is stronger than the court recognized at the time it issued the May 6 opinion. First, after having a fuller opportunity to review the applicable state law, the court is convinced that, except in circumstances that do not apply here, no interim bail remedy is available in New Jersey pending post-conviction review.[4] Second, the intervening months have provided further

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[4] See discussion *infra*.

evidence that petitioner presents neither a risk of flight nor a danger to the public.

Third, and most significant, the court has concluded that the behavior of the State before this tribunal is to be condemned for a reason beyond those cited in the May 6 opinion. More than merely indicating prosecutorial bad faith, the pattern of misrepresentation and disrespect for the orders of this court and the New Jersey Supreme Court displayed by the state in connection with the May 2 hearing represent a course of conduct that may contribute substantially to delays in efforts by petitioner to attain timely final resolution of his claims. Such prosecutorial maneuvering could, if encouraged, have the effect of contributing to inordinate delays in the processing of petitioners' claims for relief. Such delay has been recognized as a separate ground for granting post-conviction bail, *see Glynn v. Donnelly*, 470 F.2d at 99 ("extraordinary delay" by district court might justify appellate court in granting federal bail to habeas petitioner), and even for waiving the exhaustion requirement and entertaining an unexhausted habeas petition on the merits. *See Landano*, 897 F.2d 675 n.23 (delay by state court). While the court does not go so far as to find the State's behavior a basis for considering the petition on the merits, the court is satisfied that the potential for delay inherent in the State's behavior is an independent "extraordinary factor" weighing in favor of granting federal bail in this case.

The question that remains to be addressed is whether the court's determination that Landano has failed to exhaust his underlying claims precludes the court from continuing to extend federal bail. Because the court concludes that it is not so precluded, it will order that

Landano's bail be continued, pending the appeal of his claims in the state courts.

In reaching this conclusion, the court is guided by the fact that the Third Circuit has clearly contemplated a situation in which a federal court may retain jurisdiction of a habeas petition in order to extend bail, even though the petitioner has failed to exhaust his state remedies. *See Lucas v. Hadden*, 790 F.2d at 367. In *Lucas* itself, for example, the district court had ordered petitioner to exhaust his state remedies while deferring ruling on the merits of his petition and admitting him to bail pending exhaustion of his claim in the state courts. *Id.* at 366. Further, at the appellate level in *Lucas*, it was conceded that petitioner had not exhausted state remedies, yet, in denying him bail, the circuit court reached the issue of the appropriate standards for federal bail, rather than merely dismissing his bail application based on his failure to exhaust his underlying claims. *Id.* It may be that the class of cases permitting such an arrangement is minuscule, particularly because, as the Third Circuit has indicated, non-exhaustion of state remedies is itself a factor weighing against the granting of federal bail. *Id.* However, the court concludes that where sufficient "extraordinary circumstances" exist, a federal court will be justified in granting bail notwithstanding petitioner's failure to exhaust; and the court is satisfied that the present action easily falls within this class of cases.

Further, the court concludes that, although petitioner has failed to exhaust his state remedies on his claims for permanent relief, he is properly excused from the exhaustion requirement with respect to his claims for interim relief, based on the "absence of available state corrective

process." 28 U.S.C.A. § 2254. As both parties have recognized, New Jersey law does not provide for relief in the form of bail in post conviction proceedings.[5] New Jersey courts have held that "while a defendant before trial has a constitutional right to bail, any right to bail after conviction must be statutory." *State v. Garcia*, 193 N.J. Super. 334, 338 (App. Div. 1984). It is this court's view that no New Jersey statute authorizes bail in a post-conviction proceeding such as this. In *State v. Rose*, 88 N.J. Super. 86 (Law Div. 1965), the Law Division held that a defendant was not entitled to release on bail pending resolution of a post-conviction proceeding, since no specific court rule affirmatively provided for such relief. The only rule providing for post-conviction bail, now Court Rule 2:9-4, provides for bail "[p]ending appeal to the Appellate Division." The *Rose* court interpreted this rule as allowing bail only pending the prosecution of an appeal before an appellate court, not in a motion for post-conviction relief. *See also State v. Smith*, 43 N.J. 67, 74 (1964), *cert. denied*, 379 U.S. 1005 (1965) ("a post-conviction proceeding may not be used as a substitute for an appeal from a judgment of

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[5] *See* Supplemental Opinion, May 6, 1991, Slip Op. at 7 (Pet. App. at 1094A); Respondent's Letter Memorandum to the New Jersey Supreme Court, Indictment No. 73-76, March 11, 1991, at I & XIII (Pet. App. at 967A & 979A) ("bail is not available during the pendency of a Petition for Post-Conviction Relief;" "[i]n summary, the defendant does not enjoy a constitutional right to post-conviction bail; the bail statutes are void of any provision which defendant might rely upon, and the New Jersey Rules of Court provide no guidelines or procedures that would permit the defendant to prosecute a post-conviction relief application while admitted to bail").

conviction"). This interpretation has been followed by other New Jersey courts. *See, e.g., State v. Cavanaugh*, 174 N.J. Super. 90, 94 (Resentencing Panel 1979) ("[a] defendant, prior to conviction, generally has a right to bail, not merely by rule (R. 3:26-1), but by force of Constitution. After conviction in the event of appeal, he has the right to bail only under the specific circumstances set forth in R. 2:9-4. . . . No provision is made for bail in post-conviction relief applications") (*citing State v. Rose*).

In petitioner's state court proceeding itself, Judge Walsh denied bail on the grounds that "[i]n New Jersey it seems that bail is not available in [post-conviction relief] petitions." Transcript of Court's Opinion, Indictment No. 73-76, at 23 (Superior Court, Law Div. November 7, 1990) (Pet. App., State Court Transcripts, Ex. 2). Based on a review of the state authorities, Judge Walsh concluded that "there is no bail available in a case such as this one which I am attempting to decide." *Id.* at 24 (*citing State v. Rose*, 88 N.J. Super. 86). On November 7, 1990, the Appellate Division affirmed Judge Walsh's denial of bail without opinion. On November 15, 1990, the New Jersey Supreme Court took the unusual step of staying Landano's arrest pending disposition of his petition for post-conviction relief. Order, No. M-407/408/409 (Sup. Ct. N.J. Nov. 15, 1990) (Pet. App. at 1107A-08A). However, the Supreme Court dismissed as moot Landano's motion for bail, thus making clear that the extraordinary relief it had afforded Landano was not premised on any right under state law to bail pending pursuit of post-conviction relief. Accordingly, the court concludes that under the present state of New Jersey law, bail is not available in a petition for post-conviction relief. Hence, petitioner's failure to

exhaust his state claims for permanent relief is no bar to this court providing him relief with respect to claims for interim relief, for which there is no state corrective process.

Further, the court finds it significant that the concern for comity between state and federal courts, which underlies the exhaustion doctrine, is not implicated by granting bail to petitioner. *Strickland v. Washington*, 466 U.S. 668, 679 (1984); *Landano v. Rafferty*, 897 F.2d 661, 668 (3d Cir. 1990). There would be no point in sending Landano back to the state system to pursue bail relief which is unavailable there. Nor, under comity principles, is there any affront to the state courts in this court retaining jurisdiction solely in order to extend bail, since New Jersey courts could not "pass upon the matter" in any case. *Rose v. Lundy*, 455 U.S. 509, 518 (1982) ("the doctrine of comity . . . 'teaches that one court should defer action on causes properly within its jurisdiction until the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter'") (*quoting Darr v. Burford*, 339 U.S. 200, 204 (1950) (citation omitted).

Moreover, this court has already reviewed and passed upon the appropriateness of releasing petitioner on federal bail. *Cf. Granberry v. Greer*, 481 U.S. 129, 135 (1987) ("if a full trial has been held in the district court and it is evident that a miscarriage of justice has occurred, it may also be appropriate for the court of appeals to hold that the non-exhaustion defense has been waived in order to avoid unnecessary delay in granting relief that is plainly warranted"). Accordingly, the ends of respect for state judicial process, justice, and judicial

economy are best served by relying on and reaffirming the previous determination of this court, that petitioner has satisfied the high standard required for the granting of federal bail pending disposition of post-conviction relief proceedings.

The court concludes that the non-exhaustion and comity doctrines mandate that this court should not proceed to the merits of petitioner's claim until he has presented the unexhausted new issues, as identified by the Third Circuit, to the state courts and pursued all applicable appellate procedures therein. However, the court further finds that the principle of comity also permits this court to continue bail to petitioner while he pursues his state remedies. Therefore, this court will retain jurisdiction for the limited purpose of affording petitioner bail, but stay all other proceedings before this court until such time as petitioner has fully exhausted his state remedies.

Conclusion

For the foregoing reasons, respondent's motion to dismiss is denied, petitioner's grant of bail is renewed, and this action is otherwise stayed, pending petitioner's exhaustion of appropriate state remedies.

/s/ H. Lee Sarokin
H. LEE SAROKIN, U.S.D.J.

Date: February 4, 1992

Original to: Clerk, U.S. District Court

Copies to: Joel A. Pisano, U.S. Magistrate Judge

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

VINCENT JAMES LANDANO, Petitioner, v. JOHN J. RAFFERTY, Superintendent East New Jersey State Prison, and ROBERT DEL TUFO, Attorney General of the State of New Jersey, Respondents.	Civ. No. 91-1881(HLS) **ORDER** (Filed Feb. 4, 1992)

This matter having come before the court upon the motion of respondents to dismiss petitioner's petition for

the writ of habeas corpus; and the court having considered the submissions of the parties; and for the reasons expressed in the accompanying opinion; and for good cause shown,

IT IS this 4 day of February 1992, hereby

ORDERED that respondent's motion to dismiss petitioner's petition for the writ of habeas corpus be and hereby is denied; and it is further

ORDERED that petitioner be continued on bail on the terms and conditions set forth in the court's order of May 2, 1991; and it is further

ORDERED that this action is otherwise stayed, pending petitioner's exhaustion of appropriate state remedies.

/s/ H. Lee Sarokin
H. LEE SAROKIN, U.S.D.J.

Supreme Court, U.S.
FILED
OCT 13 1992
OFFICE OF THE CLERK

No. 92-436

In The

Supreme Court of the United States

October Term, 1992

VINCENT JAMES LANDANO,

Petitioner,

vs.

JOHN J. RAFFERTY, SUPERINTENDENT, RAHWAY STATE PRISON, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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APPENDIX

Appendix A — Letter Opinion and Order of the Superior Court of New Jersey Dated July 17, 1992 ..... 1a

No. 92-436

In The

Supreme Court of the United States

October Term, 1992

VINCENT JAMES LANDANO,

Petitioner,

vs.

JOHN J. RAFFERTY, SUPERINTENDENT, RAHWAY STATE PRISON, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENTS' BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

The respondent did not seek to prevent the exercise of federal jurisdiction over the new habeas corpus petition by filing a motion before the state court as alleged by the petitioner. The respondent's sole purpose was to seek clarification of the state court's opinion of March 4, 1991 denying the evidentiary hearing. In fact, the

petitioner, upon receipt of said opinion and in order to avoid state appellate processes, immediately filed an order to show cause on the habeas petition in federal court.

On March 12, 1992, the New Jersey Appellate Division reversed the trial judge's denial of post-conviction relief and remanded for an evidentiary hearing.

On July 17, 1992, following a full evidentiary hearing, the trial judge denied all relief in a written opinion (*See* Opinion and Order, 1a).

SUMMARY OF ARGUMENT

Probable innocence is neither an extraordinary circumstance warranting the enlargement of the petitioner on federal bail nor sufficient as a matter of relevant case law, *Lucas v. Hadden, infra,* to warrant consideration of same.

REASONS FOR DENYING THE WRIT

I.

DID THE DISTRICT COURT ABUSE ITS DISCRETION IN GRANTING BAIL TO A STATE PRISONER PENDING EXHAUSTION OF STATE REMEDIES BY FINDING THAT PROBABLE INNOCENCE WAS AN EXTRAORDINARY CIRCUMSTANCE JUSTIFYING SAID ACTION.

Since there is not a statutory provision in New Jersey for bail pending the resolution of state post-conviction proceedings it is incumbent upon a federal court granting same to first establish the existence of extraordinary circumstances. This proposition was first articulated in *Lucas v. Hadden*, 799 F.2d 365 (3rd Cir. 1986),

wherein the Third Circuit set forth the standard for determining whether a state habeas petitioner who has not exhausted state remedies is entitled to bail. In adopting the "extraordinary circumstances" test, Judge Adams wrote:

> We doubt that it is appropriate to grant bail prior to ruling on a State habeas petition solely on the ground that there is a high likelihood of success on the merits, especially absent exhaustion of State remedies.

Id. at 367.

Finding no "extraordinary circumstances" to merit a preliminary grant of bail in *Lucas*, the court offered no bright line test for determining such circumstances. Rather, it suggested a case-by-case analysis.

Findings of "extraordinary circumstances" have rarely occurred and have usually involved situations such as the petitioner's extreme ill health or the imminent completion of a sentence of incarceration. In *Calley v. Callaway*, 496 F.2d 701 (5th Cir. 1974), the court of appeals reversed an order granting bail to a habeas petitioner finding no extraordinary or exceptional circumstances which would merit permitting the petitioner to remain enlarged on bail pending resolution of the petition. In its ruling, the *Calley* court recognized there might be circumstances, other than petitioner's poor health, which would merit the enlargement of a habeas petitioner on federal bail. Those circumstances include a petitioner who is close to completing a short sentence for a relatively minor offense, in that collateral review would be ineffective if such review occurred after the completion of the custodial sentence.[1]

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1. *Noyd v. Boyd*, 395 U.S. 683 (1965); where all but two days of a one-year sentence served; *Levy v. Parker*, 396 U.S. 1204, *aff'd*, 396 U.S. 804 (1969) where all but

(Cont'd)

In *Sawyer v. Whitley*, ___U.S. ___, 112 S. Ct. 2514 (1992) this Court, in its review of a capital murder conviction was asked to determine.

> "... whether a petitioner bringing a successive, abusive, or defaulted federal habeas claim has shown he is "actually innocent" of the death penalty to which he has been sentenced so that the court may reach the merits of the claim."

Id. at 2517.

This Court's holding was couched in language that demands a far more substantial showing from certain habeas petitioners than had previously been thought necessary. *Compare*, *Kuhlmann v. Wilson*, 477 U.S. 436 at 455, N. 17. The language utilized by this Court is such as to warrant the belief that the direction in which this Court is proceeding in regard to habeas petitions will prove more rather than less restrictive. As such it is therefore reasonable to assert that *Herrera v. Collins*, ___ U.S. ___, 112 S. Ct. 1074 (1992) will continue in this vein thus compelling the overall conclusion that a finding of "probable innocence", as in this matter, will remain patently insufficient even after *Herrera* is decided.

Furthermore, it would be incorrect to automatically conclude that the parameters within which a finding of "actual innocence"

(Cont'd)

twelve days of a three year sentence served; *Boyd v. City of Orlando*, 402 F.2d 966 (5th Cir. 1968) which involved a one hundred twenty day sentence. But *see Bronson v. California*, 328 F.2d 159 (9th Cir. 1964) *cert. denied*, 380 U.S. 951 where defendant was ordered to serve 180 days as a condition of five years probation. Defendant argued he was entitled to bail since he would finish his incarceration quickly and thus his habeas corpus could become moot. However, since defendant would remain on probation, under *Jones v. Cunningham*, 371 U.S. 236, this probation sentence is enough of a control over defendant to avoid mootness. Thus, bail was properly denied.

can arise will be the same, either definitionally or factually, in a non capital case as in a capital case. The logic of this conclusion is found in the juxtaposing of the best case scenerio for a habeas petitioner in a capital case, that of a credible confession to the crime by another person, with the concluding sentence of that paragraph wherein it is stated that the concept of "actual innocence" is readily apparent in non-capital cases. *Sawyer v. Whitley, supra,* 112 S. Ct. at 2519.

Although the petitioner has convinced the district court of his probable innocence it is significant to note that the language utilized by the district judge is less then absolute in that regard. The district judge recently stated it had "already determined that petitioner *may be* (emphasis added) innocent of the charges for which he was convicted," *Landano v. Rafferty,* 782 F. Supp. 986, 992 (D.N.J. 1992) (*quoting Landano v. Rafferty,* No. 91-1881, slip opinion at 7 (D.N.J. May 6, 1991) (Supplemental Opinion and Order).

Thus the analysis which results in the conclusion of "probable innocence" is substantially less definitive in the language chosen to express same then an extension of the relevent cases defining "extradordinary circumstances" would seem to allow.

The Third Circuit, while focusing on the rationale utilized by the district court in granting bail to the petitioner pending his exhaustion of state remedies, discussed the issue of "probable innocence" and concluded that the cases which have examined this issue did so from the perspective of a federal court's right to" overlook a procedural default, not a failure to exhaust state remedies." (Pet. App. p. 27). The Third Circuit concluded its discussion of this point by stating, "When the State has not completed its review of the petitioner's claims, it is inappropriate for a federal court to reach the merits of petitioner's case in ruling on a motion for bail." (Pet. App. p. 27).

Furthermore, even if "probable innocence" was thought the relevent test, it is clear that the concept of "extraordinary circumstances", as defined by applicable case law, far outshines the opaque language chosen by the district court while summarizing its deeply felt beliefs regarding this case. When viewed in the light of the language of *Sawyer v. Whitley, supra,* this truism becomes even more apparent.

CONCLUSION

The petitioner's petition for a writ of certionari should be denied in its entirety as he has failed to establish a sufficent basis to warrant same being granted.

Respectfully submitted,

CARMEN MESSANO
Prosecutor of Hudson County
EDWARD J. DE FAZIO
First Assistant Prosecutor
Attorneys for Respondents

APPENDIX A - LETTER OPINION AND ORDER OF THE SUPERIOR COURT OF NEW JERSEY DATED JULY 17, 1992

SUPERIOR COURT OF NEW JERSEY

Maurice A. Walsh, Jr.
Judge

Hudson County Courthouse
Administration Building
Jersey City, NJ 07306

[seal]
Seal of the Superior Court of New Jersey

July 17, 1992

Smith, Mullin & Kiernan, P.C.
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AND

Carmen Messano, Prosecutor
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Attn: Donald Gardner, Asst. Pros.

Re: State vs. James Landano
Ind. No. 73-76

Letter Opinion
Post Conviction Relief Evidentiary Hearing

Dear Sirs:

On March 12, 1992, the Appellate Division, Superior Court of

Appendix A

New Jersey (A-4458-90TI) in its opinion ordered as follows:

> We therefore remand for a full evidentiary hearing on the "new" issues not previously subject to an evidentiary hearing in the State court and for further consideration of any previously considered ruling which may be impacted or affected by consideration of these "new issues." Specifically, the evidentiary hearing shall consider the claims stemming from documentation that two people including a witness at trial, Pascuiti, failed to identify a photograph of defendant (the "ID on Landano" issue) and a police continuation report that a witness or witnesses identified Forni as the driver of the getaway car ("the Basapas/ Pasapas Report" issue) and that this information was not submitted to defendant at or before trial. The hearing shall also consider any other claims or issues incidental thereto, including the impact, if any, of any lost or destroyed material. As noted, it could be that the prior post-conviction determinations concerning the Roller, Portas and Roth testimony may be seen in a different light based on development of the record concerning the "new issues." The taking of testimony on these questions, too, may become essential to an understanding of the entire investigation. We emphasize, however, that by ordering a full evidentiary hearing, we suggest no predisposition or inclination concerning the merits. Irrespective of disposition, however,

> the judge must "state separately [his] findings of fact and conclusions of law. *R. 3:22-11.*" 22-23.

In accordance with the above order, this court conducted a full evidentiary hearing on May 7, 8, 11 and 12, 1992.

This case has a long history of State and Federal Court rulings. In an effort to keep the proper focus on what has happened to date, this court, rather than incorporating by reference former opinions and actions taken in this matter (as has been done from time to time in the past), is going to impose upon the readers of this opinion and attempt to capsulize the events of the past sixteen (16) years.

In October 1976, a Hudson County Grand Jury returned Indictment 73-76 charging Vincent James Landano (hereinafter, Petitioner), Allen Roller, Victor Forni and Bruce Reen with felony murder (N.J.S. 2A:113-1 and 2), three counts of armed robbery (N.J.S. 2A141-1 and 2A:251-5), breaking and entering with intent to steal (N.J.S. 2A:94-1), receiving a stolen motor vehicle (N.J.S. 2A:139-3), possession of a firearm without a permit (N.J S. 2A:151-41), and conspiracy to commit armed robbery and murder (N.J.S. 2A:98-1).

Co-defendants Forni and Reen were severed from the trial of Petitioner and co-defendant Roller. On April 18, 1977, pursuant to a plea bargain, co-defendant Roller entered a plea of non-vult to the felony murder charge. Petitioner's jury trial commenced the following day, April 19, 1977.

On May 17, 1977, the jury found Petitioner guilty on all counts. On that same day this Court imposed a life sentence on Petitioner for the felony murder count. On June 9, 1977, after merging several of

the remaining counts, this Court imposed an additional consecutive sentence of seven to fifteen years.

Victor Forni and Bruce Reen were subsequently tried and convicted on the conspiracy charge. They were acquitted on all other counts.

On June 19, 1977, Petitioner filed an appeal with the Appellate Division. On September 26, 1978, Petitioner filed a second motion with the Appellate Division seeking to have the matter returned to this Court for consideration of a new trial motion. This second motion was granted.

The new trial motion involved 1.) an alleged recantation by Roller, who was then in the State penal system, of Petitioner's involvement in the crimes; 2.) evidence allegedly linking co-defendant Forni to an earlier robbery in Jersey City which contradicted Roller's testimony that while he (Roller) was involved, Forni was not; and 3.) a claim of prosecutorial misconduct in allegedly suppressing evidence that Roller, Forni and Reen were possibly linked to two robberies in Perth Amboy which predated the crimes involved in this case.

This court held three (3) days of evidentiary hearings and denied the motion for a new trial. (Opinion dated December 1, 1978).

On March 21, 1980, the Appellate Division affirmed this Court's denial and also denied petitioner's direct appeal of the verdicts.

On July 8, 1980, the New Jersey Supreme Court denied certification. *State v. Landano*, 85 N.J. 98 (1980).

Appendix A

On March 31, 1982, Petitioner filed another petition for post-conviction relief. Since this trial judge was in retirement, the matter was assigned to, and heard by, the Hon. Joseph P. Hanrahan, J.S.C. (now deceased). In that action, petitioner argued the following points:

1.) A so-called "Allen" charge;

2.) Newly discovered evidence of coercing identification testimony from witness Jacob Roth;

3.) Newly discovered evidence of coaching witness Raymond Portas by the Prosecutor in reference to his identification evidence;

4.) Newly discovered evidence concerning Officer Snow;

5.) Accumulation of alleged prosecutorial misconduct leading to the need for a new trial;

6.) Allegations of lost photographs;

7.) Portas' alleged identification unfairness.

Following evidentiary hearings on these issues, Judge Hanrahan denied Petitioner the relief sought and issued several letter opinions detailing his reasoning.

On January 30, 1984, the Appellate Division upheld Judge Hanrahan's disposition of these issues. The subsequent Petition for Certification was denied by the New Jersey Supreme Court on June 13, 1984.

On October 10, 1985, Petitioner filed a petition for a writ of habeas corpus in the U.S. District Court of New Jersey. The matter

was assigned to the Hon. H. Lee Sarokin, who considered the following issues:

1.) Portas' identification testimony;

2.) Suppression of exculpatory impeachment testimony of Roller;

3.) Suppression of exculpatory impeachment testimony of Roth;

4.) The "Allen" charge of this Court.

On September 29, 1987, Judge Sarokin denied relief.

On September 9, 1988, the U.S. Third Circuit Court of Appeals affirmed Judge Sarokin's disposition of the petition. *Landano v. Rafferty*, 856 *F.2d* 569 (3d Cir. 1988). A subsequent petition for certification was denied by the United States Supreme Court on February 21, 1989. *Landano v. Rafferty*, 109 *S.Ct.* 1127 (1989).

On June 7, 1989; Petitioner filed a motion with U.S. District Judge Sarokin seeking reconsideration of his denial of habeas corpus relief. Petitioner also made an ex parte application for a temporary restraining order.

On June 8, 1989, Judge Sarokin granted the temporary restraining order and Petitioner's counsel was permitted to review various State documents.

On July 27, 1989, the District Court issued a conditional writ of habeas corpus requiring the State of New Jersey to release Petitioner unless a new trial commenced within 90 days. The

following day, July 28, 1989, the District Court also ordered Petitioner released on bail.

On February 27, 1990, the U.S. Third Circuit Court of Appeals reversed the District Court and directed said court to "... vacate the order conditionally granting the writ of habeas corpus and dismiss Landano's petition. We also direct the District Court to vacate all orders it issued in this matter subsequent to its initial order denying Landano's petition."

Certification was denied by the United States Supreme Court on October 1, 1990. *Landano v. Rafferty*, 111 *S.Ct.* 46 (1990).

Petitioner thereafter filed a new petition for post-conviction relief with this Court. Petitioner's attorney, by letter to this Court dated February 7, 1991, stated that in the Federal Courts he had "conceded that all of the issues raised or suggested by the "Pasapas Report" and the "ID on Landano" document were previously presented to the State Courts." Also, during oral argument before this Court on February 15, 1991, Petitioner's attorney once again agreed that the above issues were previously presented and thus barred under *R. 3:22-5.* (cf. pages 4 & 5 of this Court's April 8, 1991 letter opinion). The petition for post-conviction relief was denied in a letter opinion dated March 4, 1991.

On March 12, 1991, the Hudson County Prosecutor, through Asst. Prosecutor Susan B. Gyss, moved for a rehearing on petitioner's post-conviction relief application. A hearing was then held by this Court on March 22, 1991.

On April 8, 1991, this Court denied the Prosecutor's petition.

On March 12, 1992, the Appellate Division remanded this

matter for a full evidentiary hearing as discussed in the opening paragraph of this opinion.

I

As stated by this Court in its opinion dated December 1, 1978, on Petitioner Landano's motion for a new trial[1], at page 3:

"This Court concludes and finds that a fair interpretation of the facts adduced at trial would be as follows:

"On August 13, 1976, at approximately 9:00 a.m., two white males held up at gun point one Jacob, Roth, trading as the Highway Check Cashing Service located at 40 Jacobus Avenue, Kearny, N.J. During the course of this armed robbery a Newark police officer, John Snow, who was delivering money to the trailer where this business was conducted, was shot and killed by one of the participants.

"Shortly thereafter four suspects were arrested: [Petitioner] Vincent James Landano, Allen Roller, Victor Forni and Bruce Reen. All four were subsequently indicted by the Hudson County Grand Jury and charged among other things with armed robbery, first-degree murder of a police officer and conspiracy to rob and murder.

"Because of various legal and factual considerations this court severed defendants Forni and Reen from the trial of defendants Roller and Landano. As the Roller and Landano trial was about to commence, on May 19, 1977, defendant Roller made a plea arrangement with the State and entered a plea of *non vult* to felony

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1. Once again this Court wishes the readers of this opinion to keep in mind all that has transpired to date and asks patience in rereading prior material.

murder. As part of the plea bargain Roller agreed to testify against defendant Landano at his trial.

"At the Landano trial, Roller testified that originally he and a man named David Clyburn had planned to rob the check-cashing service but that Clyburn withdrew, and Forni agreed to provide him with another person to help commit the robbery. Clyburn was named in the indictment as an un-indicted co-conspirator and was also a State witness. His testimony generally corroborates Roller's; *viz.*, that he was involved in the initial planning of the robbery but withdrew out of fear for his own safety. Both Roller and Clyburn testified that they and Forni familiarized themselves with the location of the robbery site by driving several times from Staten Island, N.Y., where all of these individuals lived, to the area where the trailer was located in South Kearny. Forni's car was the one used to make these preliminary surveys in New Jersey.

"Roller further testified that Forni introduced him to defendant Landano and that, when invited, Landano agreed to do the job with him. Throughout his testimony, Roller constantly involved Forni in the planning of the crime but insisted that Forni was not involved in the actual armed robbery and murder. He testified however that Forni drove him and Landano to New Jersey on the date of the incident and was physically present when the car to be used in the crime was stolen at the Bayonne Barrel Co., Newark, N.J. His testimony was that Forni then withdrew and was not physically present at the scene. Testimony of other eye witnesses to the crime corroborates that two white males actually participated in the armed robbery and murder and that there was no black male involved. The relevance of this testimony will be discussed below.

"Roller testified at length as to Landano's involvement in the crime. He stated that he met Landano two days prior to the robbery at Landano's apartment, which he described, and that on the next day another preliminary run was made to the robbery location, this

time with Landano. Roller testified that on the morning of the robbery, he met Landano at Forni's house. All three went to New Jersey in Forni's car and Roller stole an automobile for the purposes of the robbery. Roller and Landano left in the stolen car, and proceeded to commit the crimes while Forni presumably returned to Staten Island.

"Roller, after driving past the scene twice, drove the automobile into the parking lot of the check-cashing service. He and Landano left the vehicle and approached a customer who was sitting in a van; he instructed Landano to force this person to lie under the van. Roller then approached the check-cashing service which was located in a trailer, and attempted entry. He could enter only by breaking the door window and by opening the door from the inside. Upon entry, Roller took a drawer used to store money and fled while the occupants of the trailer lay on the floor. As he left the trailer, Roller saw Landano approaching from the vicinity of a police patrol car holding an attache case. Landano ran to the driver's position of the stolen car and Roller dove through an open window into the back seat, leaving the cash drawer on the roof of the car. Landano at this point, according to Roller, stated that he had to "ice" or "waste" the police officer, and they both then drove from the scene.

"Although the original plan encompassed the use of the stolen car as a means to return to Staten Island, Landano took the wrong direction and drove the car to the end of a street with no outlet and into a grassy area. After exiting the vehicle Roller placed two packets of money from the attache case into his waistband and, at Landano's suggestion, threw both his revolver and the pistol used by Landano into a nearby body of water.

"At this point, Roller and Landano left the scene independently. Roller traveled to Forni's house, arriving between

10:00 and 10:30 that same morning; Landano arrived shortly thereafter and the money was divided. Later that day, Landano went to Roller's house with Forni, Landano appearing to have removed the moustache which he had during the robbery. Landano suggested to Roller that he remove his own beard and moustache. Landano indicated that he was going to the New Jersey shore area and also suggested that Roller leave the area.

"During the course of this testimony, Roller identified Landano and the jacket and hat which Landano was wearing that day. Although Roller could not remember if the hat was worn during the robbery, both were found at the scene of the abandoned stolen car. Roller also identified the pistol used by Landano which was found by the authorities in the water near the location of the car.

"In addition to Roller's implication of defendant Landano as his accomplice, the State at trial also produced eye witnesses who testified that two white males participated in the criminal incident.

"Jonathan Roth, a college student at the time, and son of the owner of the check-cashing service, testified that he was in the trailer when the robbery occurred and that two white males were involved. He made an in-court identification of defendant Landano as well as a photo identification and testified that Landano was one of the men involved.

"Another eyewitness, Jacob Roth, owner of the check-cashing service also identified defendant Landano in court, as well as by photograph, as a co-participant. He also referred in his testimony to two white males. It was he who wrote down the license plate number of the getaway car which was subsequently found and was the same car Roller alluded to in his testimony as having been stolen specifically for the robbery.

Appendix A

"A third eyewitness, Raymond Portas, a truck driver at the time, testified that shortly after the time of the incident he observed defendant Landano driving the get-away car in a frantic manner in the area of the trailer. He saw two white males in the car an identified defendant by an in-court identification and through a photographic identification as the driver of that vehicle. He also took down the license number of the car which was later found abandoned in the general area and it was the same car Roller said he had stolen previously. . . .

"The principal thrust of the defense in the trial was alibi, and obviously the jury was not too impressed with this evidence. This court was equally unimpressed. A reading of the trial transcript indicates the weaknesses of this asserted defense. The testimonial evidence as well as the physical evidence all combine to indicate that a reasonable jury could not possibly have come to any other verdicts in this case but guilty." See opinion of this court, dated December 1, 1978, p. 3 to 9.

II

"Basapas/Pasapas Report"

One of the two main issues that this court was to explore in the evidentiary hearing is what has become known as the "Basapas/ Pasapas Report." The report is a Kearny Police Department Continuation Report for the days of January 18 and January 19, 1977, detailing the activities of Detective Edward Rose in the investigation of Officer John Snow's murder. Defendant's Exhibit 16 is a copy found in the Hudson County Prosecutor's file, and Defendant's Exhibit 17 is a more legible copy found in the Kearny Police Department file. See also S-4. The Petitioner states that he first became aware of the existence of this particular document after

having viewed the files of Jack Littman, Esq., who had been Victor Forni's attorney.

The report indicates that on January 18, Detective Rose and Lieutenant Hart obtained a 17 picture spread[2] and sought out the following witnesses; Jonathan Roth, Anne Marie DeMichello, Jose Alverez, Christopher Calabrese, and one Mike Devito.[3] Entry #1 indicates that Jonathan Roth was out of country and not expected back until "around" February 1, 1977. Entry #2 was for "Ann [sic] Marie the watiress [sic] at the B&J Diner" who "tentatively identifed [sic] a Photo of Roller as being in the diner on August 13th 1976." The officers were unable to take a statement from her at that time, so they arranged to return the following day, 1/19/76. Entry #3 was for "Mr. Alverez at the Bayyone[sic] Barrel co. [sic]." Mr. Alverez was not at work so the officers made arrangements to speak with him on 1/19/76. Entry #4 was for Mr. Calabrese, a lunch truck operator, who could not be located on that date. Uniformed personnel were instructed to have him contact Rose and Hart. Entry #5 concerned a request for a copy of entries made on [what appears to be] 8/13/76. Entry #6 involved a contact with Mike Devito, who would not be available to make a statement until Sunday, January 23, 1977.

For January 19, 1977, the following information is reflected. Slightly below and to the right of the date, there is a short entry indicating that "Arrangements made to take statements" with a date

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2. Although always referring to a 17 picture spread, Det. Rose gives that spread varying identifications: 21529 to 21544, 21528 to 25144, and 21528 to 21544. This court finds that the actual spread involved photos numbered 21528 to 21544. See S-15, 17 photo array numbered 21528 to 21544.

3. There are numerous misspellings, typos and type-overs throughout Det. Rose's work. When referring to a particular document, the spelling used in that document will be placed in italics.

of either 1/22/77 or 1/24/77, the exact day being obscured by a tyoe-over. Entry #1 indicates that Det. Rose was able to contact Jose Alverez at "Bayonne Barrell" [sic] who identified "picture # 21534 as resembling [sic] the man whom he saw in the early AM of 8/13/76 near the coffee truck. This picture is of one Frances Smyth." Entry #2 states "I then stopped at the Modern Transporttation [sic] and spoke to Joseph [B/P]asapas who requested to see more pictures. He was shown the 17 picture [spread] #21529 to 21544 and he picked out # 21532 Victor Forni as resembling the man who drove the car away. from the scene of the holdup on 1/13/76." The first letter of the individual's Sir name as it is written is obscured by either a typo or a type-over, and for the sake of clarity shall be referred to throughout this opinion as *Joseph Pasapas*. Entry #3 for 1/19/77, which is the final entry on this document, indicates that Rose showed John DeMur[i]tz "a spred [sic] of 17 pictur[es] numbered on the back 21528 to 25144 [21544] and he picked out #21528 as the man who er red the Trailer of Hi Way Check cashing service" on 8/13/76. Rose also had DeMuritz "look at the photo that he initialed and dated on August 17th 1976 and have him initial and date this photograph as the one he identified as the man who [word obscured] and heldup the HiWay check cashing service on 8/13/76. The identity of t[he] man in both photos is Allen Roller."

A

Petitioner argues that the selection of Forni as "resembling" the driver of the car by "Joseph Pasapas", whether "Pasapas" is actually a previously undisclosed witness or is a spelling corruption of "Joseph Lapas" (alternate theories put forward by Petitioner), was highly exculpatory evidence which would support Defendant's position that he was framed by the "Breed." Because there is absolutely no other reference to a "Joseph Pasapas" found in any other document conn ted with this case, Petitioner has sought to bolster his position b arguing at the evidentiary hearing that the

documentation strongly suggests that a supplemental statement was taken from "Joseph Pasapas," but that this statement was either lost or destroyed by the State. This position is based upon three points: First, the reference in the "Pasapas Report," D-17, that "[a]rrangements [were] made to take statements"; Second, the existence of statements from four of the witnesses mentioned in the "Pasapas Report," entered as D-18, D-19, D-20, and D-32; and Third, that with the exception of "Joseph Pasapas," all of the witnesses mentioned in the "Pasapas Report" were also mentioned in a subsequent continuation report, D-31.

The entry "[a]rrangements made to take statements" is significant to the Petitioner because in their interpretation of the document, this indicates that a statement of one "Joseph Pasapas" was to be taken on either the 22nd or 24th of January, 1977. Referring to Volume I of the Transcript:

DIRECT EXAMINATION OF NANCY ERIKA SMITH[4]

Q. Now, in the Pasapas Report Detective Rose refers to coming, planning to come back on January 22, 1977 to take a statement from Pasapas as well? A. Yes.

Q. Did you and the team you worked with look for the statement that Detective Rose was going to take from Mr. Pasapas? A. We certainly did.

Q. Did you and your team do a thorough search for that statement? A. Yes.

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4. Ms. Smith is a law partner of Mr. Mullin, as well as his wife.

Q. Did you find any such statement? A. No.

Q. Did you find it in the Prosecutor's file? A. No.

Q. Did you find it in the Hudson County Prosecutor — in the Kearny Police Department file? A. No.

Q. And you see that the Pasapas Report — I will work with Defendant's Exhibit 17 — says Pasapas was shown a 17-photograph spread? A. Yes.

Q. And that this man selected a photograph of Victor Forni, right? A. Yes. *T.I, 44-20 to 45-25.*[5]

CROSS EXAMINATION

Q. You have had an opportunity to review all the discovery in regard to this matter pertaining to the issue of the paragraph in Detective Rose' report concerning Basapas and/or Pasapas, correct? A. Well, no, I haven't. It refers to a, a statement that was going to be made, and that statement wasn't in the file. So I, I have looked at —

Q. Accepting that comment as true, as to a statement that was subsequently to be taken, is there any other reference in any other report pertaining to the name of Basapas/Pasapas? A. Well, there is a reference to someone else with a very similar name who worked,

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5. There are four transcript volumes from the Evidentiary Hearing, and are designated as T.I, T.II, T.III & T.IV.

really worked at Modern Transportation and that gentleman is Gus Lapas. Every reference —

Q. Is it not a fact he did not work at Modern Transportation but only a lunch truck that would go from business to business? A. Right. He didn't work for Modern Transportation. His employment, his coffee truck was at Modern Transportation. That's where Prosecutor's Office personnel and police officers talked to him.

Q. Periodically he would be at Modern Transportation? A. That is where they met him according to the documents I have seen and he was identified as a person who saw the guy driving down the street. So, he is, when you say have I reviewed everything regarding Basapas/Pasapas, I have seen references to that gentleman with a very similar name reached at Modern Transportation who saw the guy driving down the street. *T.I, 119-25 to 121-9.*

DIRECT EXAMINATION OF EDWARD ROSE

Q. Okay. Now, next to the entry for the 19th it says: Arrangements made to take statements 1/22/77. Was that, was that referring to the people you had interviewed on the 19th? A. Yes.

Q. Okay. But it was your intention to — A. Yes.

Q. — take statements on the 22nd, okay.

Mr. Gardner: Excuse me, Mr. Mullin. The 22nd? What report are you referring to? Your Honor, as to D-17, the type-over on the date, it is the 22nd or the 24th of '77.

Mr. Mullin: It is not of any significance to me. *T.III, 27-15 to 28-4.*

Looking at the existing documents which relate to D-17 it appears that the entry "[a]rrangements made to take statements" refers as much (if not more) to witnesses listed for January 18 as to those listed for January 19, and that those statements were to be taken on January 24 rather than January 22. First, the January 18, 1977 entry showing that Det. Rose interviewed "Ann [sic] Marie the watiress [sic] at the B&J Diner," indicated that a formal statement was to be taken on the following day, 1/19/77. See D-17. However, the statement of Anne Marie DeMichello, in evidence as D-18, indicates that Ms. DeMichello actually made her formal statement on 1/24/77.

Second, we have D-20, which is a partially typed and partially handwritten statement of Christopher Calabrese. The typed portion has a date of 1/24/77, some identifying information, and a single question which reads:

> I am Det Edward Rose of the Kearny Police Department and now I show you 17 photos of males, can you identify any of these men as being at your coffee truck on Friday August 13th 1976?
> Answ?

Following this, in the space provided, there is a handwritten answer which reads:

> #21542 is the closest to the guy I remember being at the truck but heavier.[6]

6. #21542 is a photo of Vincent James Landano. S-15.

This is followed by the signature of the declarant, Christopher Calabrese, and the signature of the witness, Detective Rose. Mr. Calabrese testified at the hearing that the signature was in fact his but that the remainder of the handwriting was not, although it had been written before he signed it. *T.IV, 45-15 to 46-3*. At the top of the document, in the space provided for the date, there is a single line through the word "January." Above this, but not obscuring the "original" typed date of January 24, 1977, is the handwritten date of "Feb 10, 1977", followed by stylized initials, the first of which is clearly an E, though the second is illegible. See D-20.

The clear implication is that this document was prepared for January 24, 1977, but that the interview with Mr. Calabrese did not occur until February 10.

Still looking at the January 18th entries on D-17, entry #1 shows that Detective Rose was unable to contact Jonathan Roth as he was out of the country at that time. Jonathan Roth is next mentioned in a January 24, 1977, entry found in the Kearny Police Continuation Report marked as D-31, indicating that Detective Rose had again attempted to reach him.

There are three remaining entries for January 18, 1977, found in D-17. As mentioned above, entry #3 concerns Jose Alverez who Det. Rose attempted to contact at the "Bayyone" Barrel Co. in Newark. The entry states that having failed to find Mr. Alverez at that location, arrangements were made to speak with him on January 19. This is similar to a notation found in entry #2, concerning Det. Rose's failure to obtain a statement from Anne Marie DeMichello. Unlike Ms. DeMichello, who, as already discussed, was not contacted until January 24, Mr. Alverez was reached on January 19, 1977, at the Bayonne Barrel Co. See D-17. See also S-5, Statement of Jose Alverez dated 1/19/77: *unsigned*. A

subsequent interview with Mr. Alverez occurred on January 24, at which time a signed statement was executed which reflects the same information contained in the unsigned statement of January 19, 1977. See D-32. A copy of the signed statement, dated 1/24/77, is also found in S-5.

Entries 5 and 6 for January 18 are of no particular significance, except to note that Mike Devito is again referenced in D-31 as having been contacted several times without any statement having been made.

As mentioned previously, there are three entries for January 19 on the "Pasapas Report". The first entry concerns Jose Alverez, which as already noted, indicates that Det. Rose did in fact contact him on that date. The third entry concerns John "DeMuritz", who identified photo #21528 as the man who entered the trailer at Hi Way Check Cashing on 8/13/76, and who also re-identified a photo he had selected and initialed on 8/17/76. This interview is also reflected in the Continuation Report marked D-31, though the sequence of events is reversed: the witness first "reidentified the previous photo of Allen Roller," and was then shown the group of 17 numbered 21528 through 21544. The entry on D-17 also indicates that two separate statements were taken at that time, although only the statement concerning the reidentification was presented to this court. See D-19. The only entry in D-17 which is not referenced in any other document is the January 19 entry concerning Basapas/ Pasapas and the selection of photo 21532, Victor Forni, as "resembling the man who drove the car away from the scene of the hold-up on 8/13/76."

All together there were seven individuals mentioned in the "Pasapas Report," D-17. Of the seven, two gave statements on January 24, 1977: Anne Marie DeMichello and Jose Alverez. The

record also shows that on January 24 Detective Rose reached out (unsuccessfully) to Jonathan Roth, and that he (Rose) had a partially prepared statement ready for Christopher Calabrese's signature. Taken together with the fact that January 24, 1977 was a Monday, and thus a more likely day to find *all* the above named individuals at their respective places of work than Saturday the 22nd, and with this Courts observation that the date simply looks more like 1/24/77 than 1/22/77, this Court finds as a fact that the date referred to in the "Pasapas Report" is 1/24/77. Additionally, because the record clearly indicates that Detective Rose secured statements from the above mentioned witnesses, this Court further finds that the entry referred to neither a specific witness nor only to witnesses interviewed on 1/19/77, but referred instead to those witnesses listed under both 1/18/77 and 1/19/77.[7]

That said, however, the question of whether Detective Rose ever took a statement from one "Joseph Pasapas" on 1/24/77, or any other subsequent date, remains.

During the evidentiary hearing Detective Rose was asked by Defense counsel whether there had been some "follow-up" on the

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7. Looking at D-17, it appears that before making his first entry for 1/19/77, Det. Rose made the entry in question, although they appear to have been typed contemporaneously. It will also be observed that the date "WEDNESDAY JANUARY 19th 1977", is set at a different margin and angle than either the entry in question or the entries for that date, indicating that the paper was removed at one point and that it was not typed contemporaneously with the other information. As such, the entry "[a]rrangements made to take statements . . ." could refer exclusively to the entries preceding it. Additionally, the fact that statements from two of the three witnesses interviewed on 1/19/77 were produced on that same day could have led this court to conclude that the entry referred in its entirety to witnesses interviewed on 1/18/77, notwithstanding the fact that Mr. Alverez executed a signed statement on 1/24/77. However, as there was no testimony concerning this discrete point, this court will not find as a fact that the reference had no relationship to 1/19/77.

witnesses mentioned in the "Pasapas Report." *T.III, 28-8 to 12.* Defendant's Exhibit 31, mentioned previously, is a Kearny Police Continuation Report filed by Detective Rose detailing his investigation of the Snow murder between January 19 and February 10, 1977. The document makes reference to the following individuals: John DeMaritz, "Ann" Marie DeMichello, "Johnathan" Roth (twice), Jose Alverez, Mike Devito, and Christopher Calabrese. The first entry, dated January 19, 1977, concerns the reinterview Detective Rose conducted with John "DeMaritz" which, as mentioned previously, may also be found as the final entry in the Continuation Report marked D-17. There are then three entries for January 24, 1977, the first of which is that Detective Rose showed the "same group of 17 photos" to Anne Marie DeMichello of the B&J Diner, who identified "#23806" as the man she thought she had served on the morning of "8/13/77." Presumably, Detective Rose was referring to the group of photos shown to DeMichello on 1/18/77, and that the date 8/13/77 was a typo of 8/13/76. The second entry for January 24, 1977, concerned another attempt to contact "Johnathan" Roth, who was still out of the country. The third entry for January 24, 1977, was that Detective Rose again contacted Jose Alverez who, as on 1/19/77 (D-17), selected picture #21534 as "closely resembl[ing]" the man he saw near the coffee truck on the morning of 8/13/76. Mr. Alverez failed to identify any of the suspects. This is followed by an entry for February 8, 1977, wherein Detective Rose notes that "Johnathan" Roth had returned to the U.S. but had already departed for college and would not be available until "sometime near Easter." There is then an undated entry concerning Mike Devito, indicating that although Mr. Devito did not appear to have any significant information, Detective Rose would continue to try and get a statement from him. The final entry, dated February 10, 1977, shows that Detective Rose "re-interview[ed]" Christopher Calabrese at one of his coffee stops and had him look through the 17 photo spread, #21528 through #21544. Mr. Calabrese identified

photo 21542 as being "closest to the guy he saw at his coffee truck" on the morning of 8/13/76, that being a photo of Vincent James Landano.

The facts, therefore, concerning whether a subsequent statement of "Joseph Pasapas" was ever taken may be summarized as such: 1) that there was a general reference contained in the "Pasapas Report" to the effect that arrangements were made to take statements on "1/24/77" of an unspecified number of the witnesses who were contacted by Detective Rose on the 18th and 19th of January; 2) that of those witnesses, two gave signed statements on the 24th, another one was unsuccessfully sought out on the 24th, and a fourth was apparently expected to give a statement on the 24th of January; 3) that of all the witnesses mentioned in the "Pasapas Report," D-17, only "Joseph Pasapas" is not mentioned in the continuation report marked as D-31.

Drawing upon these facts, the Petitioner has made the following corollary: Follow-up statements were to be taken of witnesses; Statements were taken from some witnesses; Therefore, a statement of "Joseph Pasapas" must have been taken. The evidence adduced at the hearing, however, does not support this deduction. It was incumbent upon the Petitioner to present the Court with some proof that a statement was in fact taken or at least that it was Detective Rose's intent to take such a statement. The mere fact that the thing sought cannot be found will not serve as proof of its existence in a court of law. Additionally, this court finds that the evidence presented to it actually demonstrates that such a statement never was taken. Rather than adding strength to Petitioner's position that a statement of "Joseph Pasapas" was taken on or about January 24, 1977, D-31, which details the "follow-up" on the witnesses listed in D-17, seems to exclude all possibility of such an event ever having occurred. As such, this Court finds as a fact that there never was a statement of a "Joseph Pasapas" made after January 19, 1977.

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B

As mentioned previously, Petitioner's position has been that "Joseph Pasapas" is either a previously unidentified witness or a misspelling of Gus Lapas, whereas the State has taken the position that "Joseph Pasapas" is in fact a misspelling of Joseph Pascuiti, the error being the result of poor typing skills, inattention to detail, or a transposition of several witnesses' names.

The evidence presented at the evidentiary hearing concerning the "true" identity of "Joseph Pasapas" focused in large part upon the inconsistencies in Detective Rose's work product, primarily the spelling of Pascuiti's name and the name and address of his employer. See *T.III, 38-19 to 40-6.*

1.) A Kearny Continuation Report, dated 8/13/76, on the second of three pages, indicates that Detective Rose spoke to "Joseph Pascuto," employed by "Modern Transportation," which was located "next door to Jack Roth's."

2.) A Kearny Continuation Report, dated 8/16/76, by Detective Rose; "Joe Pascuto — Modern Warehouse — daw [sic] dark haired guy." See S-5.

3.) A Kearny Continuation Report, dated 8/19/76, by Detective Rose; "Joseph Pscuto of the Metropolitan Trucking Co. of 46 Jacobus Avenue . . ." Picked out Bruce Reen. See S-5; See also D-25 and D-35, same document, recovered from Prosecutor's file and Kearny Police Department file, respectively.

4.) A Kearny Continuation Report, dated 8/23/76, by Detective Rose; "Joseph Pascuiti, Metro Trucking, who stopped on two pictures, one was Forni but he replied he could not positively I.D. either of them." See S-5.

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5.) A Kearny Continuation Report, dated 8/26/76, by Detective Thompson; "Joseph Pascuto, Modern Warehouse, negative." See *T.III, 84-22.*

6.) A Kearny Continuation Report, dated 8/26/76, by Lieutenant Hart; "Joseph Pascuto." See D-37.

7.) Handwritten notes of Detective Thompson made on or about 8/26/76, the "I.D. on Landano" Document (discussed infra); "Joe Pascuto." See D-22.

8.) A Kearny Continuation Report, dated 8/31/76, by Detective Rose; "We then went to Modern Transportation — 42 Jacobus Avenue, So. Kearny, to speak to Joe Piscullo and showed him the newly acquired mug shots but he could not identify anyone.[8] He requested that if we do get anymore photo's to try for a profile shots as he remembers man from profile." See S-5.

9.) A handwritten witness list prepared by former Assistant Prosecutor Mulcahy, undated; "Joe Pascuito, Modern Warehouse, 42 Jacobus Ave. Saw incident — corroborates McCormick. NB See if he can say no beard on shooter. 8/19/77 Picks out Reen's photo - not positive 8/26 Neg on *L.* 8/31 - Neg on *L.*" See D-12.

Although each document references an individual with the first name of "Joe" or "Joseph," there are five different last names: Pascuto, Pscuto, Pascuiti, Piscullo, and Pascuito. The only place where Joseph Pascuiti's name is recorded accurately is the Rose report of 8/23/76. Besides Mr. Mulcahy's notes, the only documents

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8. "Newly acquired mug shots" is a reference, at least in part, to a more recent photo of Vincent James Landano than was shown to witnesses on 8/26/76. This point is discussed more fully in a later section.

which accurately reflect the name of Joseph Pascuiti's employer are the Rose report of 8/16/76 and the Thompson report of 8/26/76. Additionally, Detective Rose's report of 8/31/76 provides the correct address, though wrong name, of Pascuiti's employer, while his report of 8/13/76 accurately describes the location as being "next door" to the crime scene.

While each of these entries varies from the preceding one, just as the subsequent entry varies from it, this Court finds that there are enough similarities to say unequivocally that they all refer to Joseph Pascuiti, who was employed at Modern Warehouse, 42 Jacobus Avenue, situated "next door" to Highway Check Cashing.[9]

Between 8/31/76, when Joseph Pascuiti gave a negative I.D. of Petitioner, and 1/19/77, the date "Joseph Pasapas" selected a photo of Victor Forni, this Court can find no documents referencing Joseph Pascuiti. Nor, for that matter, can this Court find in the documentation presented much in the way of investigative work between early September 1976 and January 1977; i.e. none of the other witnesses are mentioned in this intervening period either.

At the evidentiary hearing, the Court heard from two State's witnesses concerning the possible existence of "Joseph Pasapas." Dennis Stellato, a supervising state investigator for the New Jersey Division of Criminal Justice, testified as to his efforts in determining the "existence or nonexistence" of "Joseph Pasapas." See *T.IV, 24-7 to 32-1.* Mr. Stellato ran a check on the names "Pasapas," "Papasapas," and "Basapas," and variations of those names, with the following agencies; the New Jersey Division of

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9. The most common misspelling, "Pascuto," is found in D-22, the "I.D. on Landano" Document, and has been adopted by Petitioner as in fact being a misspelling of Pascuiti. See *Defendant-Petitioner's Proposed Findings of Fact and Conclusions of Law*, pp. 19 to 20.

Motor Vehicles, the New Jersey Division of Taxation, New Jersey Unemployment, and the U.S. Health and Human Services Agency. Mr. Stellato also stated that the names were checked through N.C.I.C. in the event there were any outstanding warrants for persons by those names. He testified that the results were negative. On cross-examination, Mr. Stellato conceeded he did not personally know how far back any of these agency checks went and that an illegal alien would probably not show up at all. See also S-11.

The second State witness on this issue was John A. Robbins, treasurer of Spectraserv, Inc., successor to Modern Transportation Company. Mr. Robbins reviewed the employment records of Spectraserv/Modern Transportation for the time period of May 1, 1976 through April 30, 1977, in an effort to determine whether there had been an employee by the name of "Joseph Basapas" or "Pasapas." Mr. Robbins testified that there was no record of any such employee during that time frame. *T.IV, 50-6 to 52-17*, See also S-16, *Certification of John A. Robbins.*

Along these same lines, the State questioned Detective Rose, on cross, as to the "developm[ent]" of witnesses during the investigation. Detective Rose agreed that the bulk of the investigation occurred during the first few weeks following the crime, and agreed that "for the most part any witnesses who were to be developed had been found, spoken to, [and] respoken to, if necessary." *T.III, 58-14 to 22*. Detective Rose testified that at the time his January 19, 1977 Continuation Report (D-17) was prepared they were "reinterviewing everybody, almost everybody as witnesses." Furthermore, in response to the question of whether "[i]n January 1977 were [there] any new witnesses, previously not located, discovered and interviewed," Detective Rose replied that there were not. *T.III, 60-5 to 8.*

As mentioned previously, Petitioner has argued that if "Joseph

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Pasapas" is a misspelling for any known witness it probably a misspelling of Gus Lapas. Gus Lapas operated a coffee truck in the vicinity of the crime and had apparently observed the getaway vehicle. The evidence regarding Mr. Lapas' observations consists of the following:

1. D-25, a Kearny Continuation Report of Detective Rose, dated August 19, 1976, indicating that Gus Lapas was "reinterv[ie]wed" at Second Street and Jacobus Avenue. He was shown an array of seven photos and he stopped on Bruce Reen, stating "It looks like the man who was driving the car."

2. S-1, a handwritten affidavit of Gus Lapas given on July 10, 1989, in which he states that during 1976 and 1977, he stopped at "Modern Transportation" on a daily basis, and that during that period he was asked to go to the Prosecutor's Office on two or three occasions to view photographs. He further stated that he had no recollection of whether he ever selected a photo.

3. The evidentiary hearing, where Mr. Lapas testified that on the day of the crime he was parked in the vicinity of Second Street and Jacobus Avenue, near Modern Transportation, which was routinely his first stop of the day. His attention was drawn to the get-away vehicle because as it sped past, a hub cap came loose and struck his truck. He then observed the vehicle turn down Central Avenue. He testified that on one occasion, Kearny Police came to his truck and showed him photos, and that on one or two other occasions he went to the Prosecutor's Office and viewed photos. *T.III, 95-2 to 13.* Mr. Lapas seemed to indicate that on the one occasion when the police showed him pictures at his truck, it was early in the investigation. ("He came and he show me some pictures. I don't remember if he is the same day or day after.") *T.III, 99-5 to 7.* He was unable to recall whether he had identified anyone. *T.III, 95-2 to 13.*

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In reviewing this information, this Court concludes and finds that "Joseph Pasapas" is not a misspelling of Gus Lapas. First, besides the "reinterview" of Mr. Lapas on 8/19/76 (D-25), there is absolutely no other report which references Gus Lapas. As such, it is impossible for this Court to determine whether Detective Rose and others had a habit of misspelling Lapas and of attributing a completely dissimilar first name to him.

Second, although his recollection is faded by time, there is nothing in the record to contradict Mr. Lapas' testimony that except for the one photo array shown to him early in the investigation at his truck, he was only shown photos at the Prosecutor's Office.[10] This testimony conflicts directly with the "Pasapas" report which indicates that Detectives Rose and Hart "stopped at the Modern Transporttation [sic] and spoke to Joseph Pasapas who requested to see more pictures."

Third, while the name "Joseph Pasapas" shares four (4) letters in common with the name Gus Lapas, it in fact shares more letters in common with at least two other witnesses; Joseph Pascuiti, with which it shares nine (9) characters, and Adam Papasavas, with which it shares six (6).[11]

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10. The Court notes that the first day a photo array was shown to prospective witnesses was August 17, 1976. As such, Gus Lapas could not have been shown a photo array on either the day of or the day after the crime. The first, and indeed only documented time that Gus Lapas was shown a photo array was on August 19, 1976. See D-25. The Court finds, however, that this minor inconsistency does not detract from Mr. Lapas' overall recollection of his involvement in the investigation.

11. Papasavas was the Director of Research & Education, Local 1470, 2 Central Avenue, Kearny. On 8/18/76, he gave Kearny Police a positive ID of Allen Roller as being in the area of Local 1470 on 8/13/76. Roller stood out in his mind since pedestrians are rare in that area. Papasavas saw neither the vehicle used nor the second individual involved, and there is no allegation that he is in fact "Pasapas." He is mentioned only to demonstrate that there were other witnesses with similar names.

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Fourth, D-12, the handwritten civilian witness list prepared by then Assistant Prosecutor Mulcahy, has an entry referencing Gus Lapas' August 19, 1976 ID of Bruce Reen. In it, Mulcahy writes: "8/19 — Stops at Reen as "looks like" driver — claimed driver had mustache, dark hair." This entry severely weakens Petitioner's position since Victor Forni, by all accounts, never had a mustache.

In contrast to Gus Lapas, there exists a great deal of evidence which links "Joseph Pasapas" to "Joseph Pascuiti." The Court will begin by focusing upon the name itself.

First, in all the August, 1976, references to Joseph Pascuiti, he is consistently given the first name of either Joe or Joseph despite the fact that Detective Rose and others attributed five different last names to him.

Second, upon careful review of all the documents submitted in this hearing, this Court has determined and finds that there is not a single reference to any other witness by the name of "Joe" or "Joseph" who had direct knowledge of the crime (i.e. its execution or flight therefrom).

Third, at the evidentiary hearing, Detective Rose read the "Pasapas" entry as being "Joseph Basapas." *T.III, 56-12 to 16.*[12] This point was seized upon by Petitioner as he sought to show that "Basapas" could not be a misspelling of Pascuiti. Detective Rose's testimony, however, does not prevent this Court from making its own observations of this document.

In other entries on the "Pasapas Report," reference is made to

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12. The Court notes that prior to this point, Petitioner had consistently referred to a Joseph "Pasapas."

the "Bayonne Barrell" [sic] Co. Even a casual reading of these entries reveals that these two capital "B"s bear absolutely no resemblance at all to the "Basapas/Pasapas" entry. Rather, this Court finds that a fair reading of this entry shows that the two letters involved in this typeover are a capital "O" and a capital "P." The fact that these two letters are located next to each other on the key board lends support to this reading. As such, one of two possible readings of this name, as typed, would match the first three letters of *Pas*cuiti.

The Court next looks at "Joseph Pasapas' " place of employment. The "Pasapas Report" indicates that "Joseph Pasapas" was spoken to "at" Modern "Transporttation" [sic]. At the hearing and in papers filed in connection with it, the Petitioner has argued three points; 1) Since Pascuiti was employed at Modern Warehouse, not Modern Transportation, "Pasapas" cannot be a reference to Pascuiti; 2) "Pasapas" was shown a photo array "at" his place of employment, whereas Pascuiti testified at the hearing that he was only shown photos at the Police Station; and 3) that while Joseph Pascuiti worked at Modern Warehouse, Gus Lapas operated his coffee truck, and was interviewed in the area of, Modern Transportation, and the inference is that he, rather than Pascuiti, is the real "Pasapas."

As with the spelling of Joseph Pascuiti's name, Detective Rose demonstrated an inability to accurately record the name of Pascuiti's employer. In the eight references to Joseph Pascuiti, his place of employment is given four different ways; three times as "Modern Warehouse," twice as "Modern Transportation," once each as "Metropolitan Trucking" and "Metro Trucking." The two entries which give Modern Transportation as Pascuiti's employer, however, both correctly locate the employer as being directly adjacent to Highway Check Cashing; the report of 8/13/76, which puts Modern Transportation "next door to Jack Roth's," and the

report of 8/31/76, which places Modern Transportation at 42 Jacobus Avenue, So. Kearny. As such, the fact that "Pasapas" was interviewed at "Modern Transporttation" [sic] does not serve to exclude Joseph Pascuiti as being the "actual" witness.

The Petitioner also argues that Joseph Pascuiti can not be "Joseph Pasapas" because D-17 indicates that "Pasapas" was interviewed and shown photos "at" his place of work, whereas Joseph Pascuiti testified at the evidentiary hearing that he had only viewed photo arrays at the Kearny Police station. See *Defendant-Petitioner's Proposed Findings of Fact and Conclusions of Law, 16-72, 35-5.*

DIRECT EXAMINATION OF JOSEPH PASCUITI

Q When officers or detectives from Kearny came to see you what would normally occur? A They would come to my employer and, you know, ask to see me, and generally I would go down and talk to them, and there had been occasions I had gone to Kearny Police Department.

Q And on the occasions when you spoke to them would they ever show you anything and, if so, what? A When I was at the Police Department I have showed — they showed me stacks of pictures. *T.IV, 15-7 to 17.*

Q Then after this period of time had elapsed did there come another occasion when officers and/or detectives from Kearny approached you in regard to this matter? A Yes.

Q Would you tell us about that? A The officer was, — The officers would come to my employment and, you know, ask me questions about the incident. And then I would in turn go back to

their Police Department – Nothing was done at the premises. – usually go back to the Police Department, and they would, you know, show me or hand — not hand me — show me pictures, you know not individual pictures, at all times there were stacks of photos, and I looked through them. *T.IV, 20-8 to 22.*

Contrary to Mr. Pascuiti's recollection, however, there is documentary evidence which indicates that he was in fact shown photo displays at his place of employment. D-25, which is a Kearny Police Continuation Report of Detective Rose dated August 19, 1976, clearly indicates that Detectives Rose and Thompson took a set of mug shots to the second precinct and "recanvassed the area." Once in the area, they "proceeded to Ruethers Bar and Grill on Jacobus Avenue, So. Kearny to investigate . . . . ," after which they "proceeded to the B.&J. Restaurant on Old Lincoln Highway and spoke to a Danny Roche, owner . . . [and] Ann Marie De Michello [sic] . . . ." The third entry reads as follows:

> We then proceeded to reinterview Joseph Pscuto of the Metropolitan Truckin[g] Co. of 46 Jacobus Avenue, So. Kearny and showed him seven mug photos of seven males. He picked out the photo of Bruce Reen and stated "He looks like the man but he's not positive".

Following the interview of "Pscuto," Rose and Thompson "then proceeded to Second St. and Jacobu[s] Ave., So. Kearny, and spoke [to] Gus Lapas, owner of the Athens Catering," and then to the area of the Bayonne Barrel and Drum Co.

Within the Continuation Reports marked S-5, we also find that the report dated 8/31/76 clearly states that Detectives Rose and Thompson went to "Modern Transportation" where they showed "Joe Piscullo" the "newly acquired mug shots." The Continuation

Report of August 23, 1976, can also be read as indicating that Detective Rose went out in the field.

This Court, therefore, finds as a fact that Joseph Pascuiti was interviewed and shown photo arrays at his place of employment. As such, the statement that "Joseph Pasapas" was interviewed "at" Modern Transportation does not serve to exclude Joseph Pascuiti.

Although this Court has already put forward its reasoning for excluding Gus Lapas as being the "real" "Joseph Pasapas," there is the connection between Gus Lapas' routine of stopping in front of Modern Transportation, and "Joseph Pasapas" having been interviewed "at" that location, which needs to be addressed. From the evidence presented, this Court concludes that early on in the investigation, Gus Lapas was shown a photo array at his truck once, and that on one or two other occasions such displays took place at the Prosecutor's Office. As discussed previously (see footnote 12) D-25 documents the one time that Gus Lapas was shown photos at his truck;

> We then proceeded to Second St. and Jacobu[s] Ave., So.Kearny, and spoke [to] Gus Lapas, owner of the Athens Catering of 332 Montclair Ave., [Montclair], NJ, whom we reinterviewed . . . .

It will be observed that Detective Rose indicated where this interview took place by writing down the nearest intersection rather than the nearest business establishment. In contrast to this single reference concerning Gus Lapas, seven (7) of the nine (9) references to Joseph Pascuiti indicate some variation of the name of his employer. Viewing D-17 against this background, this Court finds that the fact that "Joseph Pasapas" was interviewed at Modern Transportation serves to include rather than exclude Joseph Pascuiti, while at the same time it tends to exclude Gus Lapas.

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D-17 indicates that Detective Rose stopped "and spoke to Joseph Pasapas who requested to see more pictures." This entry could refer to either a preexisting request or one that was made once Rose was there.

In either case, the Continuation Report of August 31, 1976, indicates that Joseph Pascuiti "requested that if we do get anymore photo's [sic] to try for a profile shots as he remembers man from profile." As of that date, therefore, Pascuiti had a continuing interest in trying to identify the shooter/driver.

Petitioner has attempted to show that an inconsistency exists between the "Joseph Pasapas" entry and the overall testimony of Joseph Pascuiti; that Pascuiti focused upon the individual who shot Officer Snow, whereas "Pasapas" picked Forni as "resembling the man who drove the car away . . . ." This Court is not persuaded that such an inconsistency exists. Of the nine (9) documents listed earlier in this section, the relevant information given by Pascuiti was; 1) 8/16/76, ". . . [s]aw dark haired guy;" and 2) 8/19/76, "He picked out the photo of Bruce Reen and stated he looks like the man but he's not positive." This Court finds that there is nothing inconsistent between these statements and the "Pasapas" entry. More to the point, however, is the fact that Joseph Pascuiti testified at trial that the shooter and the driver of the automobile were one in the same. See *S-14, Trial Trans., 8.94-4 to 23*. In fact, his testimony indicated that he was able to make the connection between the shooter and the driver because of the view he got of the driver as he drove away. *Id., 8.101-1 to 4*.

The Court is also aware that during the course of the investigation, Joseph Pascuiti had on at least two occasions selected a photograph of Victor Forni. The first occurrence was on August 23, 1976, where Pascuiti "stopped on two pictures, one was Forni but he replied he could not positively I.D. either of them." See S-5.

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The second occasion was sometime in early 1977, when Pascuiti selected Victor Forni's photo as resembling the shooter based upon the hair and "profile" as depicted in the photo.[13/14] See *S-14 Trial Trans. 8.101-19 to 8.102-20.*

The facts, therefore, as to who "Joseph Pasapas" was may be summarized as follows, and this Court finds:

1.) That except for a single entry in D-17, there is absolutely no other proof that an individual by the name of "Joseph Pasapas" exists or ever existed. "Joseph Pasapas" is found in no other document connected to this case, is not listed by State or Federal agencies which maintain records of social security numbers, drivers licenses, tax records, unemployment insurance, or criminal histories, nor was such a person found in the employment records of Modern Transportation;

2.) That there is no documentation that affirmatively supports the theory that Gus Lapas is "Joseph Pasapas," and in fact the available evidence weighs against such a theory;

3.) That Joseph Pascuiti shares eight (8) or nine (9) characters (depending on the reading) in common with "Joseph Pasapas;" That of the nine (9) documents which reference Joseph Pascuiti, his last name is recorded correctly only once (Rose report of 8/23/76), and that even the witness list prepared by former Assistant Prosecutor

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13. It will be noted that this photo of Forni has been submitted in evidence at this hearing and that it is a full-face shot, not a profile.

14. During cross-examination, Defense Counsel specifically asked Pascuiti whether he had been shown this array in January. He was unable to recall exactly when it was shown, except to agree that other than any displays he may have viewed at the Prosecutor's Office, it was in 1977. (The trial occurred in April of 1977).

Mulcahy (D-12) records it incorrectly ("Joe Pascuito"); That in each of these nine (9) documents, Pascuiti's first name is given as either "Joe" or "Joseph;" That Pascuiti is known to have picked Forni on at least two (2) occasions; That Pascuiti was *shown* photos "at" his place of employment several times; That his employer had been mis-reported several times including two (2) times as Modern Transportation; That Joseph Pascuiti's employer (in whatever form) was mentioned in seven (7) of the nine (9) documents submitted, and that the "Pasapas" entry also named the employer; That on August 31, 1976, Joseph Pascuiti, in the last report in which he is clearly referenced, requested to see more photos, and that "Pasapas" similarly requested to see more photos; That whereas Pascuiti testified at trial that the shooter and the driver were one in the same, he specifically testified as to his view of the driver, just as "Pasapas" spoke of the driver, and; That Detective Rose testified that in January 1977, there were no new witness being developed, only reinterviewing of existing witnesses, and that this testimony is supported by the documentary evidence received.[15]

While none of these facts standing alone would lead this Court to reach a concrete conclusion as the "true" identity of "Joseph Pasapas," when weighed in their entirety this Court finds as a fact that the reference to "Joseph Pasapas" contained in the Continuation Report of January 18/19, 1977, is actually a reference to Joseph Pascuiti.

C

Having found as a fact that "Joseph Pasapas" is actually Joseph

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15. There was also a copy of the Continuation Report of 1/18/77, submitted by the State, in which Mr. Mulcahy had scratched out "Pasapas" and written in "Pascuiti." See S-4. As the court has no idea where this copy of the "Pasapas Report" came from, it was not given any weight.

Pascuiti, this Court must still consider whether this document, D-17, was in fact suppressed, and if so, whether post conviction relief should be granted.

The evidence presented on this issue can be summarized as follows. Nancy Erika Smith, Esq., co-counsel for Petitioner, testified at the hearing that the Continuation Report of January 18/19, 1977 (D-17), was not present in any of the discovery that was in the possession of Petitioner, his trial counsel, or Mr. Mullin. Ms. Smith stated that they first discovered this document when reviewing the files of Jack Littman, Esq., who had served as Victor Forni's trial counsel. *T.I, 71-1 to 11; 127-18 to 128-7.* This Court does take note, however, that over the past fifteen years, Petitioner has changed attorneys and that many court proceedings have been held in which evidence was constantly being scrutinized, checked and then passed along between the various participants.

On direct-examination, former Assistant Prosecutor Mulcahy testified as to the general practices of the Prosecutor's Office concerning discovery, as well as his own perceptions of what was required of the State. In line with this, he was questioned as to the meaning of Defendant's Exhibits 7, 8, and 9. He stated that he had no recollection of any document which detailed discovery submitted to Petitioner's trial attorney in the fashion that D-7 did.[16] Mr. Mulcahy was also questioned as to the importance of such documents as D-8 and D-9, discovery receipts signed by Reen's and Roller's attorneys, respectively. Mr. Mulcahy conceded that such documents were important, but noted they were not definitive as to

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16. D-7 is a discovery document listing police continuation reports and statements taken in the period between 8/13/76 and 10/1/76. The first of the six pages has a hand written note by Mulcahy indicating the listed documents were sent to Reen's attorney on 3/30/77, with one copy to Petitioner's attorney and a copy to be made for Roller's attorney.

the materials sent, nor were they more important than actually turning over the materials. See generally *T.I, 143 to 150.*

On cross-examination, Mr. Mulcahy testified that he had a continuing obligation to turn over evidence to the defense, and that exhibits such as S-2, which disclosed the names of two witnesses the State planned on using, and S-3, a cover letter generally outlining supplemental discovery, both of which are dated March 11, 1977, indicate that he was fulfilling that obligation. *T.II, 114-6 to 118-9.* He further testified that due to the "good business . . . and professional relationship" he held with James Flynn (trial counsel) it was not necessary for him (Mulcahy) to receive a receipt for each transmission of discovery. *T.II,* 119-3 to 22. On redirect, Mulcahy conceded that he had no actual recollection of mailing S-2 and S-3, only that it would have been normal business practice. Additionally, he conceded that he had no present recollection of which reports were actually sent at that time although it would have been his practice to have sent all reports in his possession. *T.II, 134-3 to 125.*

Beyond the testimony of Ms. Smith and Mr. Mulcahy, and the documents mentioned (D-7, 8 & 9; S-2 & 3), there is also the trial testimony of Joseph Pascuiti. As has been mentioned previously, Mr. Pascuiti was asked during cross-examination whether he had selected a photo of Forni from an array in January 1977. Though unsure of the exact month, Pascuiti testified that, excluding any displays shown at the Prosecutor's Office, he had been shown the display sometime prior to trial in early 1977. Because this is the same array used by Detective Rose on January 18/19, 1988, the inference is that counsel had knowledge of this display because he had possession of the document, D-17.

In determining whether the State has suppressed evidence, the burden is, of course, upon the Petitioner. *State v. Engel,* 249 *N.J.Super.* 336, 389 (App.Div. 1991). A prosecutor is presumed to

have knowledge of all the evidence present in his files, and such knowledge is imputed to the prosecutor where actual knowledge is lacking. *United States v. Agurs*, 427 *U.S.* 97, 96 *S.Ct.* 2392, 49 *L.Ed.2d* 342 (1976). Additionally, a prosecutor's file is considered to be co-extensive with police files and knowledge of those files contents is similarly imputed to the prosecutor. *State v. Carter, 69 N.J.* 420 (1976), at 429; see also *Giglio v. United States*, 405 *U.S.* 150, 92 *S.Ct.* 763, 31 *L.Ed.2d* 104 (1972).

The evidence presented, in this Court's opinion, implies that the Kearny Continuation Report of January 18/19, 1977, was turned over, but is insufficient for this Court to say definitively that is was. As such, for purposes of argument, this Court will draw the strongest inference in favor of the Petitioner and assume (arguendo) that this document, D17, was not turned over and that it was suppressed by the State.

The question thus becomes whether the State's failure to disclose this document warrants post conviction relief. "The suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or punishment." *Brady v. Maryland*, 373 *U.S.* 83, 87, 83 *S.Ct.* 1194, 1196, 10 *L.Ed.2d* 215 (1963); *State v. Carter, supra*, 69 *N.J.* at 432. The Courts draw no distinction between impeachment evidence and exculpatory evidence. *United States v. Bagley*, 473 *U.S.* 667, 676, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985). The burden remains upon the Defendant to demonstrate that (1) the evidence was of a favorable character for the defense, and (2) that the evidence was material. *State v. Engel, supra*, 249 *N.J.Super.* at 389.

The suppressed document is arguably exculpatory. On cross-examination, counsel could have used the document to drive home the point that Pascuiti had in fact selected Victor Forni's photograph

in January. On re-cross-examination, as pointed out by Petitioner, trial counsel may have been in a better position to "undo Pascuiti's testimony, on re-direct, that he had not selected a photograph from the array of 17 photographs." See *Defendant-Petitioner's Proposed Findings of Fact and Conclusions of Law*, pp. 34. Such a re-cross could have served to both impeach Pascuiti's testimony and to "exculpate" Petitioner.

In determining the materiality of suppressed evidence, the Supreme Court in *United States v. Aqurs, supra*, developed three different definitions of materiality to cover three general factual settings. *State v. Enqel, supra*, 249 *N.J.Super.* at 389; *United States v. Aqurs, supra*, 427 *U.S.* at 103-107, 96 *S.Ct.* at 2397-2399.

> First, where the prosecution knowingly uses perjured testimony, the Court has held that the conviction will be set aside if there is a "reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 *U.S.* at 103, 96 *S.Ct.* at 2397, 49 *L.Ed.2d* at 349-350. The second situation, illustrated by the facts in Brady, is one in which the defense has made a specific request for the withheld evidence. The Court has determined that the conviction must be vacated if the suppressed evidence might have affected the outcome of the trial. 427 *U.S.* at 104, 96 *S.Ct.* at 2397, 49 *L.Ed.2d* at 350. the third variation is found where the defense has made no request, or only a general one, for the undisclosed material. In that setting, a reversal has been said to be required if the "omitted evidence creates a reasonable doubt that did

> not otherwise exist." *Id.* at 112, 96 *S.Ct.* at 2402, 49 *L.Ed.2d* at 355.

State v. Engel, supra, at 389-390.

More recently, in *United States v. Bagley, supra*, the Supreme Court chose to apply the single standard of materiality put forward in *Strickland v. Washington*, 466 *U.S.* 668, 104 *S.Ct.* 2053, 80 *L.Ed.2d* 674 (1984), which held that withheld materials are material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different;" a "reasonable probability" being defined as "a probability sufficient to undermine confidence in the outcome." 473 *U.S.* at 682, 105 *S.Ct.* at 3383; *State v. Engel, supra*, 249 *N.J.Super.* at 390.[17]

In discussing these developments on the Federal level, the Appellate Division in *State v. Engel, supra*, noted that the New Jersey Supreme Court in *State v. Marshal*, 123 N.J. 1, 200 (1991), declined to adopt the standard of materiality enunciated in *Bagley*. There, in addressing the situation where defendant had made a specific request for the nondisclosed information, the New Jersey Supreme Court held that the standard of materiality remained "whether the suppressed evidence might have affected the outcome of the trial." *State v. Marshal, supra*, 123 *N.J.* at 199; citing *United States v. Agurs, supra*, 427 *U.S.* at 104, 96 *S.Ct.* at 2398. "In essence, the 'might have affected the outcome' test requires the application of a harmless error analysis." *Id.* at 200, citing *State v. Carter*, 91

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17. The Appellate Court in *Engel* noted that *Bagley* applied the *Strickland* test to those situations involving 'no request,' 'general request,' and 'specific request' cases, but was not clearly made applicable to cases involving the knowing use by the prosecution of perjured testimony.

N.J. 86, 114; *State v. Macon*, 57 *N.J.* 325 (1971). The *Marshal* Court, however, failed to address the third factual situation of *Agurs*, where either no request or only a general request for discovery has been made. That being the case, the Appellate Division in *Engel* could only "assume" that the "sliding scale" analysis originally developed in *Agurs*, and applied in this State in cases such as *Carter, supra*, 91 *N.J.* at 112, had been retained by the State Supreme Court. *State v. Engel, supra*, 249 *N.J. Super.* at 392.

It is this third standard of materiality which is applicable here, and this Court finds that the information contained in the Kearny Continuation Report of January 18/19, 1977, when viewed against the overwhelming evidence of Landano's participation independent of and including the testimony of Joseph Pascuiti, falls far short of the applicable standard by failing to create a reasonable doubt as to Petitioner's guilt.

The specific value of the information contained in this report is highly speculative. The fact is that Joseph Pascuiti was effectively cross-examined by trial counsel as to his inability to positively identify the man he saw shoot Officer Snow and then drive off. Counsel brought out the fact that Pascuiti thought the actor's hair and profile resembled that of Forni's photo. *Trial Trans., 8.102*. He had Pascuiti agree that the actor had "short" and somewhat "curly" hair. *Id., at 8.100*. Pascuiti also testified that the actor did not have a mustache. *Id., at 8.98*. The jury knew, therefore, that Pascuiti had selected Forni as "resembling" the actor who not only shot Officer Snow, but who drove off afterwards.

The Court is similarly unconvinced that possession of D-17 would have altered trial counsel's ability to rebut the re-direct of Pascuiti, or that counsel would in fact have done so. The thrust of re-direct was that Pascuiti was "not certain of anyone." *Id., 8.103.*

Once again, the entry in D-17 indicates that Pascuiti thought Forni "resemb[ed]" the driver. Pascuiti did not give a positive ID of any suspect.

This Court finds that no reasonable doubt as to Petitioner's guilt is raised by the information contained in D-17 in any of its possible uses, sufficient to undermine its confidence in the verdict.[18]

III

"I.D. on Landano" Document

The second principal issue before this Court concerns what has been referred to as the "I.D. on Landano" document (hereafter "Landano Document"). This document consists of a half-page of handwritten references to several witnesses which was found by Defense counsel while inspecting the files of the Kearny Police Department. *T.I, 47-22 to 24*. The document was prepared by William J. Thompson, formerly a detective with the Kearny Police Department, and was entered into evidence as Defendant's Exhibit 22. *T.III, 73-15 to 22*.

The Petitioner argues that the "Landano Document" not only shows that several witnesses actually ruled Landano out as a suspect, but that the document provides corroboration of Raymond

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18. Petitioner made passing reference to an empty folder found in the Prosecutor's file, which had the following handwritten notation on the outside: "Forni looks like guy who was driving down street — Det. Rose — Pictures of (3) three suspects — 44875." See D-23 & 33. At the hearing, Det. Rose testified that this was not his handwriting and that he did not know whose it was. *T.III, 33-24 to 34-24*. Assuming, arguendo, that this envelope contained the photo of Forni selected by Pascuiti on January 19, 1977, (based on the language) the conclusion of this Court on the "Pasapas Report" remains unchanged.

Portas' "claim that the State improperly used photo arrays." See *Letter Brief of Defendant, 4/29/92, p.14.* This position is based upon an interpretation of the document as "demonstrat[ing] by its language, its wording," that the State showed a single photograph (rather than an array) of Landano to Joseph Pascuitti, Chris Calabrese, and Anne Marie DeMichello, important witnesses to the state, and that they actually ruled Landano out as a suspect. *Ibid., p.16 to p.17.*

The document has a heading which reads "ID on Landano" followed by an entry of "Joe Pascuto-hair not right — suspect had curly hair." The next entry concerns two individuals, Liloia and Gourdine from BASF, followed by the notation "nothing." The third entry is "J&B - rest[aurant] girl & guy —younger looking." Next is a reference to "Calabrese Chris coffee truck -hair not right — more curley [sic]." The final reference reads "Jack Roth's statement page 3," with a large plus symbol marked between "page" and "3". This document is undated and unsigned. *T.III, 73-23 to 75-4.*

It will be observed that the document does not have the appearance of, nor has the Petitioner demonstrated, that this is an "official" police form similar in nature to a continuation report or a witness' statement. The document appears to be an ordinary piece of 8 1/2 x 14 lined paper from a legal pad which carries no pre-printed headings. When questioned as to why he prepared this particular document, Detective Thompson testified as follows:

DIRECT EXAMINATION

Q. I really don't know. Looks like I was just doodling at the time. Something was on my mind or I was thinking of something. *T.III, 75-9 to 11.*

Appendix A

CROSS EXAMINATION

Q. The document that you have in front of you, you explained it as being doodling as a result of something on your mind? A. Yes, sir.

Q. Can you be more specific as to what the was that prompted you to write that document? A. The only thing I can say is apparently, if it was during —I was during the investigation. We did talk to these people. Whether, what the date was I don't know. And during our interviewing them these were thoughts that came up or thoughts that were mentioned and I wrote them down on a scratch pad of some sort. *T.III, 80-10 to 22.*

This description of D-22 contrasts with that given for D-36, a handwritten statement of Christopher Calabrese, dated August 17, 1976, which Detective Thompson "recognized" as being the "form we used at the time to take statements from People." *T.III, 77-25 to 78-8.*

A

The Court will first consider the issue of whether the "Landano Document" demonstrates that the State engaged in impermissively suggestive identification techniques with these witnesses. The document itself is devoid of any information concerning how the listed witnesses were interviewed. While it stands to reason that these witnesses did in fact view a photo of Landano, there is no indication of whether this was the only photo used, as the Petitioner contends, or whether Landano's picture was part of a larger array.

To rebut the Petitioner assertion that a single photo was used, the State questioned Detective Thompson on the propriety of such a

practice, which he rejected out of hand as being bad police procedure which could have a highly negative impact upon an investigation. *T.III, 82-9 to 25.* Of more interest to the Court, however, are two documents which appear to relate directly to the "Landano Document," the first of which is a Kearny Police Department Continuation Report, introduced as State's Exhibit 8 ("Thompson Report"), which details Detective Thompson's activities for Thursday August 8, 1976.

CROSS EXAMINATION

Q. On August 26th in regard to the Snow homicide, the question, sir: What did you do on August 26, 1976 in regard to the Snow homocide? A. I would have to read off this report that I responded to Second Precinct with a set of mugshots relative to the murder of Officer Snow on 8/13/76. We again interviewed the following people trying to get an I.D. on a suspect. And they were: Rosemarie, a waitress at the B.& J. Restaurant.

Q. What result? A. Negative. Joseph Pascuto, Modern Warehouse, negative.

Q. Stop. Would you please give me the spelling of that — as soon as I find a pen.

THE COURT: [Thanks] for your cooperation.

MR. [N]EISSER: No Problem.

Q. Please. A. Joe P.A.S.C.U.T.O..

Q. P.A.S. A. P. as in Peter P.A.S.C.U.T.O..

Q. Place of employment? A. Modern Warehouse.

Q. Results? A. Negative.

Q. Who else did you talk to? A. Emil Lilioa. B.A.S.F., negative results.

Q. Who else? A. Jamon Gourdine. B.A.S.F., negative results. Jack Roth, 40 Jacobus Avenue, tentative. Jonathan Roth, 40 Jacobus Avenue, positive. *T.III, 84-8 to 85-17.*

This "Thompson Report" appears to be closely tied to the "Landano Document" for the following reasons. First, of the witnesses listed in the "Landano Document," two, Emile Liloia and James Gourdine, are mentioned in only six other documents that were put before the court; S-8, the "Thompson Report;" D-37, the "Hart Report;" two continuation reports of Detective Rose, dated 8/14/76 and 8/16/76, marked S-5[19] and; two Federal Bureau of Investigation documents dated 8/18/76, marked D-30[20] Of these, only the "Thompson Report" and the "Hart Report," both dated

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19. Rose report of 8/14/76:

2- "Emil" Liloia - of Bandish Co. - operating Engineer - who claimed to have seen the men walking the raod [sic] but could not give description of the men. I asked him to reinterview on Monday. 3- James Gourdine - Foreman at the Bandish Co. who gave short interview and stated he had only seen the man for a few seconds. I then requested that we will get back to him for statement.

Rose report of 8/16/76, page 6, merely listed persons interviewed in the preceding few days, including "Emil" Liloia and "Jamon" Gourdine.

20. James Gourdine and Emile Liloia, both of BASF, reported seeing two white men; see D-30, pages marked 7 and 8, respectively.

8/26/76, were compiled after James Landano had been tentatively identified as a suspect, that having occurred on August 25, 1976. As there is no documentation that either Liloia or Gourdine were interviewed after August 26, and as both documents seem to reflect the same witness information, it appears, and the Court finds, that the "Landano Document" and the "Thompson Report" were prepared contemporaneously.[21]

Second, we have the testimony of the document's author, Detective Thompson, who testified that the "Landano Document" would have been created at the same time as his official report.

DIRECT EXAMINATION

Q. It is undated? A. It is not dated. No, sir.

Q. Are those the type of notes that you can subsequently utilize for purposes of writing a full and comprehensive report concerning what you had done on any given day? A. Yes, on a given day that I, that I did it. I couldn't do it — In other words, I feel I must have done it on the day I was doing my report on these things.
T.III 80-23 to 81-7.[22]

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21. Two of the witnesses mentioned in the "Landano Document," Christopher Calabrese and the "Restaurant Guy," are not mentioned in either the Thompson or Hart Report, S-8 and D-37.

22. Additionally, in *Defendant-Petitioner's Proposed Findings of Fact and Conclusions of Law*, the Defendant concedes, at 39-15 to 40-20, that the "Landano Document" refers to August 26, 1976, and that it is related to D-37 (which by inference would include S-8).

Appendix A

The final connection between the "Landano Document" and the "Thompson Report" is D-37, which has already been referred to as the "Hart Report" and is the second document which relates to D-22. D-37 is another Kearny Continuation Report dated Thursday, August 26, 1976, but is authored by Lieutenant Hart. This report appears to reflect all of the information contained in the "Thompson Report," which, according to DetectiveThompson, formed the basis of Hart's entries. See *T.III, 90-24 to 91-4*

The "Hart Report" reads, in part, as follows:

> Assigned Dets. Thompson and Hanson to go to the second precinct and to show a lay out of photos which included a picture of our new suspect.[23] Detectives Thompson and Hanson showed the following people this lay out of photos:
> "Rosemarie" - Waitress of the B&J Restaurant
> Joseph Pascuto
> Emil Lilioa
> Jamon Gourdine
> Results of this photo lay out proved negative with the above people.

The report also reflects that Jack Roth made a tentative I.D. of Landano, while his son, Jonathan Roth, was more positive. Colin E. McCormick also made a tentative I.D. of the new suspect.

What both the "Thompson Report" and the "Hart Report"

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23. The new suspect on August 26 was Vincent James Landano. See *T.III, 92-2 to 8.*

demonstrate is that on the first possible date any of the witnesses listed in the "Landano Document" could have been confronted with a photo of Landano, that photo was "included" in a lay out of mugshots.

At this hearing, the burden of demonstrating that the State engaged in impermissibly suggestive identification techniques rested squarely with the Petitioner. The "evidence" presented by the Petitioner on this point consisted solely of their interpretation of the "Landano Document." This is insufficient. The documentary evidence presented indicates that these witnesses were shown Petitioner's photo within an array of mug shots. D-37 includes an entry indicating that the entire lay out was shown to Jack Roth who believed the photo "might be the person if he had a Fu Manchu mustache [b]ut at this time he was not sure." The clear implication of this statement is that it was spontaneously volunteered by Roth. No proofs have been presented to the Court that would lead it to believe that the information contained in Detective Thompson's "doodlings" were not similarly spontaneous.

At the evidentiary hearing, Joseph Pascuiti testified that on the occasions when he was shown photos, he was always shown "stacks," never a single picture. *T.IV, 15-13 to 16-9*. Christopher Calabrese, a coffee truck operator who selected Victor Forni's photo in August 1976, and Petitioner's photo during a display in February 1977, testified at the hearing that at no point was he ever shown a single photo nor was he ever coached on selecting a particular photograph. *T.IV, 38-20 to 39-23*. As such, this Court is compelled to find as a fact that the "Landano Document" does not support the allegation that the State engaged in an impermissibly suggestive identification process by either using a single photo of the Petitioner or by somehow drawing the witnesses' attention to the same.

Appendix A

B

Having determined that the witnesses listed in the "Landano Document" were not subjected to an improper photo display, this court must, as with the "Pasapas Report," consider whether this document, D-22, was suppressed, and if so, whether post conviction relief is warranted.

The initial question is a simple one. The only testimony received concerning the "Landano Document" and whether it was ever turned over during pre-trial discovery was given by Ms. Smith on Redirect, who stated that prior to gaining access to the files of the Kearny Police Department (where D-22 was found) and the other State agencies involved, she had never come across this document. *T.I, 128-2 to 11.* As there is no documentation to rebut Ms. Smith's testimony, this Court will once again, for purposes of argument, draw the strongest inference in favor of Petitioner and assume (arguendo) that this document, D-22, was not turned over but was suppressed by the State. As with the "Pasapas Report," discussed supra, the question thus becomes whether the State's failure to disclose this document warrants post conviction relief.

The withholding of material evidence by the prosecution which is exculpatory or favorable to a defendant is a denial of due process and the right to a fair trail. *Brady v. Maryland, supra*, 373 *U.S.* at 87, 83 *S.Ct.* at 1196; *State v. Carter, supra*, 69 *N.J.* at 432. A prosecutor is presumed to have knowledge of all the evidence present in their files, and such knowledge is imputed to the prosecutor where actual knowledge is lacking. *United States v. Agurs, supra*, 427 *U.S.* 97, 96 *S.Ct.* 2392. Additionally, a prosecutor's file is considered to be co-extensive with police files and knowledge of those files contents is similarly imputed to the prosecutor. *State v. Carter, supra*, 91 *N.J.* at 429; see also *Giglio v. United States, supra.*

This document is also arguably exculpatory. Without overstating the obvious, we have a document in which Joseph Pascuiti, a key witness at trial, reportedly indicated to Detective Thompson that in the photograph of the Petitioner shown to him on 8/26/76, Pascuiti felt that the "hair was not right - suspect had curley [sic] hair." This same position was apparently taken by Chris Calabrese. Additionally, Anne Marie DeMichello apparently felt that the individual she saw was younger than the Petitioner appeared in the photo used on that date.[24]

As with the "Pasapas Report," discussed supra, the Court must determine whether this evidence is in fact material, and shall again apply the third standard of materiality as originally formulated in *United States v. Agurs, supra*, and apparently retained by our State Supreme Court in *State v. Marshal*. Where either no request or only a general request for discovery has been made, the omitted evidence will be found to be material if, when viewed in the context of the entire record, it establishes a reasonable doubt that was not otherwise present. *State v. Engel, supra*, 249 *N.J.Super.* at 392; *United States v. Agurs, supra*, 427 *U.S.* at 112, 96 *S.Ct.* at 2404.

During the evidentiary hearing, counsel for the Petitioner focused upon differences between the "Landano Document" and both the "Thompson" and "Hart Reports."[25] The testimony on this issue was developed as follows:

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24. From the documents provided, it appears that only two individuals from the B&J Restaurant were ever interviewed; Anne Marie DeMichello, the waitress, and Danny Roche, owner. Mr. Roach reported seeing the bearded man on both the 12th and 13th of August, but not a dark haired man. Ms. DeMichello reported seeing both. Based upon the record put before it, the Court finds as a fact that the reference to the J&B Restaurant "Girl and Guy" refers only to the impressions of Ms. DeMichello.

25. There is no indication that either the Thompson or Hart Reports, S-8 & D-37, respectively were not turned over to Landano's trial attorney, James Flynn.

Appendix A

REDIRECT EXAMINATION OF THOMPSON

Q. Sir, let me put in front of you S-8. We can agree, can't we, that S-8 which is a police report that you signed *off* on August 26, 1976 has some names that appear on Defendant's Exhibit 22, right? A. Yes, sir.

Q. Okay. But next to Rosemarie (sic), referring to S-8, it says negative, right? A. Correct.

Q. Whereas next to Rose — next to J&B Restaurant girl and guy it says: Younger looking. Does it not, sir? A. Yes, sir.

Q. Next to Joe Pascuto it says negative on S-8, does it not? A. Yes, sir.

Q. But next to Joe Pascuto on Defendant 22 it says : Hair not right. Suspect had curly hair. Right? A. Yes, sir.

Q. That is true. That phrase does not appear on S-8; isn't that true, sir? A. Yes.

Q. Okay. Chris Calabrese, whose name appears on Defendant's Exhibit 22, his name doesn't appear at all on S-8. Can't we agree on that? A. Yes, sir.

Q. Okay. Let me show you another report that seems to refer to the August 26th identification.

- THE COURT: What is that?

MR. MULLIN: Defendant's Exhibit 37. (Police report dated August 26, 1976 was marked Defendant's Exhibit 37 for Identification.)

Appendix A

Q. Thursday, August 26, a report that appears to be signed by Lieutenant Hart, two pages. Let mow [sic] show you Defendant's Exhibit 37. Take a moment and look at this because you haven't seen it and then let me ask a question or two about it. Let me know when you are ready.
Does that document, Defendant's Exhibit 37, also refer to some efforts you made with Detective Hanson on August 26, 1976 to visit various witnesses, sir? A. Yes, sir, it does.

Q. And indeed that has the name — Strike that. Indeed, Defendant's Exhibit 37 has several of the names that appear on Defendant's Exhibit 22; does it not? A. Yes, sir, it does.

Q. Okay. It has entry: Rosemarie, waitress at the B. & J. Restaurant, does it not, referring to Defendant's Exhibit 37. A. Yes, sir.

Q. Next to the entry it is blank; is it not. A. Yes.

Q. There is no reference to any statement by Ann Marie DeMichelle that she thought the suspect was younger than Landano. A. Yes.

Q. Okay. Next to Joseph Pascuto on Defendant's 37 there is also a blank; is that not correct sir? A. Yes, sir.

Q. There is no entry next to Joseph Pascuto saying: Hair not right, suspect had curly hair. Isn't that so? A. Yes, sir.

Q. Okay. And there is no entry at all next to — Strike that. There is no entry at all for Chris Calabrese; isn't that right? A. Yes, sir.

Q. We can agree nowhere on Defendant's 37 is there any reference to Chris Calabrese saying: Hair not right, more curly. Isn't that right, sir? A. Yes. *T.III, 87-17 to 90-23.*

RECROSS EXAMINATION OF THOMPSON

Q. And is it not also a fact that after the name Jamon Gourdine [sic] is the following: Results of this photo layout proved negative with the above people. A. Yes.
T.III, 91-22 to 92-1.

The Petitioner also brought out, during the direct examination of Ms. Smith, that there were no statements or reports found during their review of the State files which reflected, verbatim, the information contained in the "Landano Document." *T.I, 47-19 to 49-14.*

The court will first consider what impact the "Landano Document" may have had upon the trial testimony of Joseph Pascuiti. The following excerpts are from Joseph Pascuiti's testimony given on April 28, 1977, which was marked S-14 at the evidentiary hearing:

DIRECT EXAMINATION OF PASCUITI/TRIAL

Q. Now, what did that man look like? A. He was white, dark hair, built up in the shoulders and he wore like a little colored jacket. *Trial Trans. 8.89-14 to 16.*

Q. Now, the man that you saw, was that the driver? A. Yes, it was.

Q. What type of view did you get of the driver at that particular

time? A. A side profile.

Q. And do you know whether or not the driver — strike that. What facial characteristics, if any, do you remember of the driver at that point? A. None.

Q. Did you determine in your own mind whether or not you thought the driver was the same man you had seen next to the police officer? A. Yes.

Q. And were you able to determine the color of hair of the driver? A. Black.

Q. And how long would you estimate that the car was in front of your location as he sped by? A. Four or five seconds. *Trial Trans. 8.94-4 to 19.*

Q. Could you tell us whether or not the man, the dark haired man that you say was broad shouldered, could you tell from you vantage point on either occasion of seeing him by the police car or as he went by you, whether or not he had a mustache? A. I did not see a mustache. I couldn't tell.

Q. Did you get, at any point that day, a full face view of that man? A. No, I didn't. *Trial Trans. 8.96-3 to 10*

CROSS EXAMINATION OF PASCUITI/TRIAL

Q. And that man, to the best of your recollection, from what you saw had no mustache, is that correct? A. Yes.

Q. He was attired in a shirt? A. A short sleeve shirt.

Q. Of light color? A. Yes.

Q. And you said "yellow", I think? A. Yes.

Q. He did not have an outer jacket of any type on, did ne? A. No. I do not know.

Q. When you saw him you saw him also from the back, didn't you. A. Yes.

Q. And you could see the yellow of his shirt? A. Yes. I could see the light color shirt that he had on.

Q You said it was short sleeves? A. Yes.

Q. And you could see it was short sleeves? A. Yes.

Q. Did he have anything on his head? A. No, he didn't.

Q. In fact, you observed his hair, did you not? A . Yes, I could.

Q. And, I believe, you told us it was black? A. Yes.

Q. Possibly a little lighter than black? A. It was dark. No. It was black.

Q. I mean, do you recall ever telling the police that it was little lighter than black? A. Dark color.

Q. In any event, it was dark colored hair? A. Yes.

Q. In fact, you described it, didn't you, as being a full head of curly hair? A. He had curls. It wasn't full. It was curly hair.

Q. You say it wasn't full. What do you mean? A. Full, like out.

Q. It wasn't an Afro? A. No. It was close to the head itself.

Q. You did describe it as curly? A. Yes.

Q. Would you tell us what you mean by that? A. Curly, like small curls and just —

Q. If I may be so bold, would it resemble the Prosecutor's hair? A. No.

Q. It wasn't quite that curly? A. No.

Q. But, it was not straight hair? A. No, It wasn't.

Q. And was it closely cropped, closely cut? A. Yes.

Q. Would it be fair to say it was short? A. Yes.

Q. Now, that man who went to the police car with the gun, you're fairly certain was the man who drove the car as it sped away? A. Yes, it was.

Q. Because you got enough of a view of the man as he drove away that in your mind it compared with the man who was at the police car, is that right? A. Yes. It was the same person.

MR. FLYNN: May I see S-39?[26]

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26. S-39 is an envelope containing 17 photographs, submitted at the evidentiary hearing as S-15.

Q. Co you remember a time in August, a few days after this incident, the Kearny Police showing you some photographs? A. Yes.

Q. And specifically referring to S-39B for identification, do you recall telling them that the man looked like that man?[27] A. Yes, I did.

Q. Did you mean when you told them that, but without a beard? A. Without a beard.

Q. As far as you thought facially also without a mustache, I assume? A. Yes.

Q. But, facially and from the way his hair was you thought that it looked like the man? A. [sic] Is that right? A. Yes.

Q. Now, do you recall being shown the photographs again in January of this year? A. I saw so many times.

Q. Let me ask you this: When do you think was the last time you looked at photographs? A. It was recently.

Q. Other than in the Prosecutor's Office, would it be this year? A Yes.

Q. And I show you a whole group of photographs. Can you recognize if this group of seventeen were shown to you? A. Yes.

Q. And at that time this year when the detective showed you that group of photographs, did you, in fact, select and say you

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27. S-39B is a photograph of Bruce Reen.

thought it looked like this man in S-39C?[28] A. Yes, I did.

Q. And let me ask you, looking at that photograph, S-39C, what in that photograph resembles the man you saw going with the gun towards the police car? A. His hair.

Q. So when you said "curly", it's similar to the way the hair is in that photograph? A. Yes.

Q. Anything else about his face? A. Profile.

Q. And how about his shoulders? A. No.

Q. You don't think his shoulders —

MR. MULCAHY: I'm sorry. What's the answer?

MR. FLYNN: His answer was "No".

Q. You don't think his shoulders were as large? A. He was built up more.

Q. The man you saw? A. Yes. He had more of a bigger shoulders.

Q. But, of the seventeen pictures shown to you, and the ones I displayed, it was that picture with the man with the curly hair that you picked out as most resembling the man who ran to the police car with the gun, is that right? A. Yes, sir.

MR. FLYNN: That's all I have.

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28. S-39C is a photograph of Victor Forni.

Appendix A

REDIRECT EXAMINATION OF PASCUITI

Q. Mr. Pascuiti, you did not select any photographs from the display you saw, you were not certain of anyone, is that right? A. Right.

Q. Are you certain whether or not there was a mustache? A. No, I'm not.

Q. You're certain though that the man who was by the police officer didn't have a beard, aren't you? A. Yes, I am.

Q. And you're certain he had broad shoulders? A. Yes.

Q. And you're certain about the dark hair? A. Yes. *Trial Trans. 8.98-20 to 8.103-21.*

In Petitioner's Brief of April 29, 1992, at page 17, their view of the importance of this document as to Joseph Pascuiti was set out as follows:

> At trial, Pascuitti [sic] admitted that the killer had curly hair, but, as a State's witness, Pascuitti [sic] never ruled Landano out as a suspect. Rather Pascuitti [sic] *included* Landano as a suspect by describing the killer as having dark hair.

This same position is repeated in the *Defendant-Petitioners' Proposed Findings of Fact,* at 39-16.

As mentioned previously, the information contained in the "Landano Document" concerning Joseph Pascuiti reads "Joe

Pascuto — hair not right -suspect had curley [sic] hair." There are two aspects to this statement. The first aspect is one of "face value;" that in the particular photo of Petitioner shown to Pascuiti, he felt that the hair wasn't curly enough. Looking to the trial testimony of Joseph Pascuiti, quoted at length above, it can be seen that Pascuiti's belief that the actor had curly hair was effectively explored by trial counsel on cross-examination. As such, the possible effect of having this document, as it relates to this aspect, would be cumulative only.

The second and more important aspect, and the one on which Petitioner has based his argument, is that in rejecting this particular photo, Pascuiti was in fact rejecting Petitioner as a suspect. Two factors, however, weigh against this view. First, Pascuiti was never presented as a witness who could give a rock-solid identification of the shooter/driver. Having been some 50 yards distant from the where the shooting took place, Pascuiti was incapable of offering more than a chronology of events and giving a general physical description of the man he saw shoot and then drive off. The evidence indicates that early in the investigation, on August 19, 1976, Pascuiti had selected a photo of Bruce Reen as looking like the shooter/driver, though he was "not positive." *See Trial Transcript, 8.101-6 to 18; See also D-25/S-5, Continuation Report dated 8/19/76.* On August 23, 1976, Pascuiti "stopped on two pictures, one was Forni but he replied he could not positively I.D. either of them." *See S-5, Continuation RePort dated 8/23/76.* On August 23, 1976, Pascuiti "stopped on two pictures, one was Forni but he replied he could not positively I.D. either of them." *See S-5, Continuation Report dated 8/23/76.* On August 31, 1976, Pascuiti failed to make an identification. *See S-5, Continuation Report dated 8/31/76.* As has already been determined by this Court, on January 19, 1977, Pascuiti picked a photo of Victor Forni as "resembling" the driver. His trial testimony concerning his selection of Forni was similarly equivocal. Petitioner's trial counsel brought out the fact that

Pascuiti thought the hair and "profile" "resembled" the actor, but that the actor had larger shoulders. *S-14; Trail Trans. 8.102-9 to 25.*[29]

The second, though less persuasive factor, is that Pascuiti was not in fact ruling Petitioner out but was at most ruling out the particular picture used on that date. This Court notes that Jacob Roth gave only a tentative identification of Petitioner on this date, commenting that it "might be the person if he had a Fu Manchu mustache." See D-37. This initial photo had Petitioner wearing a mustache. On 8/31/76, Roth positively identified Petitioner from a more "recent photo" which portrayed Petitioner without his mustache. See D-12. As such, Pascuiti's reaction can be seen as having been to a particular photo, rather than to a particular person.

In addition to the foregoing, the Court notes that Pascuiti was given an opportunity at trial, in the presence of the jury, to view the photo array marked S-39 (S-15 here), and that he failed to select Petitioner's photo, and that he also failed to give any form of in-court identification of Petitioner as the perpetrator.

In sum, Pascuiti was a witness who was never able to positively identify the shooter/driver, either before or during the trial. At trial, the jury knew that Pascuiti had on at least two occasions selected others from an array in which, as of August 26, Petitioner's photo could be found. In hearing Pascuiti testify that Forni's hair and profile resembled the actor, the jury was effectively presented with all the information contained in the "Landano Document" concerning Joseph Pascuiti ; i . e ., that Pascuiti did not believe that

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29. As noted previously, trial counsel specifically asked Pascuiti about having viewed the array in January of 1977, to which Pascuiti indicated that, while uncertain as to the exact month, it had been at some point since the new year began. *Trial Transcript, 8.101-19 to 8.102-8.* The Court also points out that the photo referred to is full face, not profile.

the photo of Landano accurately depicted the shooter.

The information attributed to Christopher Calabrese in the "Landano Document" is identical to that attributed to Joseph Pascuiti; "hair not right - more curley [sic]." The role of these two witnesses, however, was quite different. While Mr. Pascuiti saw the actual crime unfolding, Mr. Calabrese supposedly served the dark haired perpetrator coffee earlier that morning. As such, Mr. Pascuiti was a key State's witness at trial whereas Mr. Calabrese was not called to testify.

During these hearings, several documents mentioning Mr. Calabrese were placed into evidence. D-36 and D-42, a signed statement and a Kearny Police report, respectively, both dated 8/17/76, indicate that Mr. Calabrese was shown an F.B.I. flyer of a white male (Terrance Karl Alden), and that he identified the same as having been at his truck on the morning of 8/13/76. D-43 is a Kearny Continuation Report dated 8/24/76, in which Mr. Calabrese is reported to have selected a photo of Victor Forni from an array as being "the person that he had seen but would look more like the person if he had a mustache and was a little heavier." D-20 is a signed statement dated February 10, 1977, in which Mr. Calabrese states that he selected a photo of Petitioner as "the closest to the guy I remember being at the truck but heavier." We also know, because of the "Landano Document," that on or about August 26, 1976, Mr. Calabrese was shown an array which included a photo of the "new suspect" (Petitioner), and that he rejected that photo.

Again, this Court is hard pressed to see how this information creates a reasonable doubt as to Petitioner's guilt. First of all, Mr. Calabrese did not testify at trial so it cannot be said that Petitioner was unable to effectively cross-examine a witness. Secondly, and more to the point, the information attributable to Mr. Calabrese in

the "Landano Document" does not alter the overall impact of his statements to the Police. It is argued by Petitioner that had trial counsel been in possession of this information, the jury could have been presented with a witness who "affirmatively ruled out Landano's photograph as depicting the killer," thus creating a "reasonable probability" of acquittal. This Court does not agree. Putting the information contained in the "Landano Document" in the light most favorable to the Petitioner, Mr. Calabrese can be seen, at worst, as being unsure in his identification. This does not create a reasonable doubt.[30]

Anne Marie DeMichello did testify at trial. The thrust of her testimony was that on the afternoon of August 12, 1976, Allen Roller and a dark haired, mustachioed man had been in the diner, and that the following morning, August 13, 1976, Roller bought two (2) containers of coffee to go. Ms. DeMichello testified that she was able to identify Roller because she thought he resembled "Jesus Christ" (Roller wore a beard), but that she was unable to remember the dark haired man. She was unsure whether she had ever seen the Petitioner before.

All the documentary evidence submitted at the hearing which mentions Ms. DeMichello echoes her trial testimony. The August 19, 1976 Continuation Report of Detective Rose reports that the "dark haired man whom she described as being shorter than the

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30. It should be self evident that even if Mr. Calabrese had been called as a witness and affirmed that he had rejected Petitioner's photo on August 26, 1976, he would undoubtedly have also been asked whether, in January of 1977, he had selected a more recent photo of Petitioner as resembling the suspect. Just as Jack Roth made a positive identification based upon the more recent photo (without a mustache), Calabrese's identification combined with his consistent position that the suspect wore a mustache would, in this Court's opinion, have been more damaging to Petitioner's position than any possible doubts Petitioner may speculate would have been created in the juror's minds.

bearded man, black hair, cut short, mustache, age 25-30, neat looking, kind of stocky, big shoulders. . . ." See S-5. The August 23, 1976 Continuation Report of Detective Rose reflects that Rose "[s]poke to 'Ann Marie' waitress at B&J Restaurant, Old Lincoln Highway but she could not I.D. the suspect Forni as the one being in the Restaurant on Thursday, August 12, 1976." See S-5. D-17 and D-18, the Continuation Report of January 18, 1977 and a statement of January 24, 1977, respectively, both indicate that Ms. DeMichello picked Roller as resembling the bearded man she saw in the diner on the August 13, 1976. S-8 and D-37, respectively the "Thompson" and "Hart" reports, both indicate that on August 26, 1976, Ms. DeMichello and three others failed to make an identification from an array which for the first time included a photo of Petitioner.

As with Mr. Pascuiti, Ms. DeMichello was never presented as an identification witness as to Petitioner. She spoke only of Roller and an otherwise unidentifiable dark haired man with the mustache. At trial, in the presence of the jury, she stated that she was unsure of whether she had ever seen Petitioner before. In light of Ms. DeMichello's inability to positively identify the dark haired man, this Court finds that the information in D-22, the "Landano Document," that Ms. DeMichello thought the suspect "younger looking" than the particular photo of Petitioner shown to her on August 26, 1976, does not give rise to any doubt on the part of this Court as to the guilt of Petitioner.

This Court finds that the information contained in the handwritten notes of Detective Thompson which were compiled on or about August 26, 1976, when viewed against the overwhelming evidence of Landano's participation independent of and including the testimony of Joseph Pascuiti, Anne Marie DeMichello, and the information provided by Christopher Calabrese, falls far short of

the applicable standard by failing to create *any* reasonable doubt as to Petitioner's guilt.[31]

IV

In conclusion, this Court, for all of the forgoing reasons, denies the petition for post conviction relief filed by Defendant Landano herein.

As mandated by the Appellate Division, this Court did in fact conduct a full evidentiary hearing and allowed the parties great leeway in introducing evidence supportive of their respective positions. This was done in order to fully comply with the Appellate Division's directive that the hearing fully explore the two "new" issues as well as "any other claims or issues incidental thereto, including the impact, if any, of any lost or destroyed material." The Appellate Division also ordered this Court to determine, if the evidence concerning the "new" issues so warranted, whether any prior post conviction determinations, such as those concerning Roller, Portas and Roth may be seen in a new light.

This Court finds that the evidence adduced by Petitioner at these hearings does not impact in any way on the trial testimony of

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31. Beyond this Court's determination that D-22 does not raise any reasonable doubt as to the Petitioner's guilt, this Court believes that a review of the related documents actually weakens Petitioner's position that it was Forni who was the shooter/driver. While Pascuiti testified that the dark haired suspect had no mustache, both Calabrese and DeMichello stated that he did. In fact, on the occasion when Mr. Calabrese selected Forni's photo, he stated that it could be the man if he was heavier and had a mustache. Forni never wore a mustache. While DeMichello never selected a photo for even a tentative identification, she had stated that the suspect had "big shoulders." This language is similar to that used by Pascuiti at trail, when, in being questioned by Petitioner's trial counsel about Forni's photo, Pascuiti stated that the dark haired suspect had "bigger shoulders." Petitioner was (at the time of trial) considerably larger in the shoulders than Forni.

either Roller, Portas or Roth, or on any other issue previously heard and decided by the various New Jersey Courts. Nor does the evidence impact upon any prior post conviction relief determinations concerning Roller, Portas or Roth, such that the evidence there would be seen in a different light.

Petitioner's witnesses, in the main, merely repeated what the various State Courts had previously heard and determined was insufficient to grant relief. The testimonial evidence failed to bring into question any of the prior court findings that have been rendered over the many years this controversy has survived.

The Assistant Prosecutor who tried the case, Mr. Mulcahy, was called by the Petitioner and testified about the original trial, general discovery practices in use at the time, and about his 1982 lecture to Professor Israel's Criminal Justice class at Kean College. Professor Israel, also called by Petitioner, testified about Mulcahy's lecture. Both of these individuals had previously testified before the late Judge Hanrahan. The Court also heard from Joseph Lotwis, Jr., of the New Jersey State Department of Banking, who testified about the relationship between Jacob Roth and Anthony Gallagher. See *T.III, 100 to 110.* This Court is persuaded, as Judge Hanrahan apparently was, that former Assistant Prosecutor Mulcahy was bragging to this class of students of his prowess as a prosecutor in the Landano case and was engaging in rhetorical excesses. Mr. Mulcahy was not fully apprised of who the woman taping his lecture was, nor of her purpose in doing so, whereas Professor Israel was.[32] The testimony at this most recent hearing added nothing new to the issue of Jacob Roth's identification of Petitioner.

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32. The individual taping the lecture was the future wife of Vincent James Landano.

Appendix A

Similarly, the documentation introduced by Petitioner sheds no new light on any previously determined issue. Of particular importance, allegedly, to Petitioner at this hearing was a property and evidence report dated April 15, 1977, which was discovered by Petitioner during his attorneys' search of the State's files. See D-13. The report, which was stapled to a statement of Raymond Portas in which he identified Petitioner, lists (7) seven different groupings of photos including 2 pictures of Victor Forni. *T.I, 37-9 to 24, 128-19 to 22.* Petitioner argues that this report supports his position that Portas initially selected a photo of Forni, that that Picture was "spirited away," and that this selection was suppressed like the "Basapas" statement was. *Defendant-Petitioner's Proposed Findings of Fact and Conclusions of Law, pg. 29.*

This Court declines to reach similar conclusions or to attach sufficient importance to this document warranting the reconsideration of Judge Hanrahan's earlier decision on Portas' recantation. It is impossible to determine from the document itself whether the listed photos were being checked out of or into the evidence room, or to determine which pictures were in fact shown to Portas (although the logical inference is that item 5, the "8 photos spread of 8/31/76," was used as Portas' statement indicates he selected Petitioner's photo from an eight photo array). See *V.II, 101-22 to 103-8.* Additionally, this Court is also mindful that when presented with a photograph of Forni at a hearing before the Hon. H. Lee Sarokin, United States District Court, on September 2, 1987, Mr. Portas testified that he could not remember whether he had ever seen the individual before. See D-40, *Transcript of Proceeding,* 18-4 to 19-2. As such, Petitioner's contentions are not supported by any persuasive evidence.

In addition to all of the foregoing, as stated by this Court in previous opinions, the verdicts of the jury in this case were not

based solely on identification testimony. At trial, the State introduced pictures taken at a check cashing business in Staten Island, N.Y. Two of these photos, taken in July of 1976, depicted Landano with a mustache and wearing a denim hat similar to the one found in the automobile used during the commission of the crime. A third photo, taken at 12:50 P.M. on August 13, 1976, showed Landano without a hat. Hair samples from the hat found in the vehicle were similar to Landano's own. Diana Pesce, a girl friend of Landano's, was called as an alibi witness. She testified that on the date of the crime, Landano had been at a Methadone Clinic and that later in the day he purchased a hat similar to the one recovered from the auto. She also testified that Landano very rarely wore a hat and that he had shaved off his mustache because of a "cold blister" sometime after August 13, 1976. She had also heard "Jimmy speak of Forni."

Landano testified that he had bought a hat on August 13, 1976, and that at one time he had owned a hat similar to the one recovered. He testified that he had shaved off his mustache sometime after August 13, 1976, although he couldn't remember exactly when. At trial, the State also introduced a jacket recovered from the vehicle, which Landano denied owning or ever having worn. The hat and the jacket were placed on Mr. Landano, allowing the jury to observe their fit.

In short, the jury had many items of evidence, exclusive of purely identification evidence, to weigh in arriving at its verdicts.

For all of the foregoing reasons, this Court denies Petitioner's request for post conviction relief. A copy of this Court's order is attached hereto.

Appendix A

Very truly yours,

s/ Maurice A. Walsh, Jr.
Maurice A. Walsh, Jr., J.S.C.
Retired and T/A on Recall

MAW,Jr.:awm

N.B. It is also recommended to the parties herein, that questions of bail be addressed to the U.S. Third Circuit Court of Appeals (where Petitioner is presently under bail restraints) and/or the New Jersey Supreme Court, which is the highest State Court to have addressed this issue.

Appendix A

SUPERIOR COURT OF NEW JERSEY
HUDSON COUNTY – LAW DIVISION
(CRIMINAL)

STATE OF NEW JERSEY,

Plaintiff-Respondent

V.

VINCENT JAMES LANDANO

Defendant-Petitioner

ORDER

This matter having originally been opened to the Court by the filing by Defendant - Petitioner of a verified petition for post-conviction relief; and

The Plaintiff-Respondent having filed an answer to said petition; and

This Court having heard oral arguments concerning the merits of said petition for post-conviction relief; and

This Court, by letter opinion dated March 4, 1991, having denied the relief sought by Defendant - Petitioner in said petition; and

This matter having subsequently been reopened by the Court through the filing by Plaintiff - Respondent of a motion for a

rehearing; and

This Court, by letter opinion dated April 8, 1991, having denied the rehearing sought by Plaintiff - Respondent; and

This Court, having been directed by the Appellate Division, in a letter opinion dated March 12, 1992, to conduct full evidentiary hearings on the two "new issues" raised in Defendant - Petitioner's original petition for post-conviction relief; and

This Court, having conducted said evidentiary hearings on May 7, 8, 11 and 12, 1992; and

This Court, by letter opinion, dated July 17, 1992, having denied the relief sought by Defendant-Petitioner; and
FOR GOOD CAUSE SHOWN;

IT IS ON THIS 17TH DAY OF JULY, 1992 ORDERED:

That Defendant - Petitioner's petition for post-conviction relief BE AND IS HEREBY DENIED.

s/ Maurice A. Walsh, Jr.
Maurice A. Walsh, Jr., J.S.C.
Retired and T/A on Recall

MAW, Jr.:awm